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In The
# Supreme Court of the United States

H.C. BAILEY, JR., W.C. BAILEY, JOAN B. BAILEY, HARPERVILLE IRREVOCABLE TRUST, JOHN T. COSSAR, GLYNN HUGHES, LEWIS S. TILGHMAN, KENNETH W. WARREN and MADISON HILLS FARMS, INC.,

*Petitioners,*

v.

UNITED STATES OF AMERICA and the FEDERAL DEPOSIT INSURANCE CORPORATION,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

The Government breached a contract, indistinguishable from those at issue in *United States v. Winstar Corp.*, 518 U.S. 839 (1996), providing Petitioners' savings and loan institution with regulatory capital. As a direct result of that breach, the thrift failed to satisfy its regulatory capital requirements, was seized by the Government, and placed in the hands of the Federal Deposit Insurance Corporation as receiver. The court of appeals accepted as true that but for the breach the thrift would have remained in business and would have been worth at least $44 million. Nevertheless, the court held that Petitioners could not recover the value of their thrift because the Government's breach also caused losses to the Government itself, as receiver and deposit insurer, in an amount greater than $44 million.

The Questions Presented are:

1. Did the Federal Circuit err in holding that the Case or Controversy requirement of Article III required dismissal of the contract claim against the Government because the damages suffered by the Government as a result of its own breach were greater than the damages suffered by Petitioners as a result of the Government's breach?

2. Did the Federal Circuit err in rejecting as a matter of law Petitioners' claim that their property had been taken without payment of Just Compensation?

## PARTIES TO THE PROCEEDING

Petitioners are H.C. Bailey, Jr., W.C. Bailey, Joan B. Bailey, Harperville Irrevocable Trust, Carol A. Bailey, Malco Irrevocable Trust, John T. Cossar, Glynn Hughes, Lewis S. Tilghman, Kenneth W. Warren, and Madison Hills Farms, Inc.

Respondents are the United States of America, the defendant-appellee in the court below, and the Federal Deposit Insurance Corporation, as Successor to Security Savings and Loan Association, a plaintiff-appellant in the court below.

## CORPORATE DISCLOSURE STATEMENT

Madison Hills Farms, Inc. is a corporation organized under the laws of the State of Mississippi. It does not have a parent corporation, and no publicly-held company owns 10 percent or more of the stock of the corporation.

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED | i |
| PARTIES TO THE PROCEEDING | ii |
| CORPORATE DISCLOSURE STATEMENT | ii |
| TABLE OF AUTHORITIES | iv |
| OPINIONS BELOW | 1 |
| JURISDICTION | 1 |
| PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS | 1 |
| STATEMENT | 1 |
| I. PROCEDURAL BACKGROUND | 5 |
| II. THE COURT OF FEDERAL CLAIMS' DECISIONS | 7 |
| A. The Contractual Ruling | 7 |
| B. The Takings Ruling | 9 |
| III. THE FEDERAL CIRCUIT'S DECISION | 10 |
| A. The Contractual Ruling | 10 |
| B. The Takings Ruling | 12 |
| REASONS FOR GRANTING THE WRIT | 13 |
| I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S ARTICLE III JURISPRUDENCE | 13 |
| II. THE RULING BELOW EVISCERATES THIS COURT'S DECISION IN *WINSTAR* | 16 |
| III. THE RULING BELOW IS CONTRARY TO THIS COURT'S TAKINGS JURISPRUDENCE | 20 |
| CONCLUSION | 30 |

## TABLE OF AUTHORITIES

Page

Cases

*Armstrong v. United States*, 364 U.S. 40 (1960) ..... 13, 28, 29, 30

*Bank United v. United States*, Nos. 02-5132 & 02-5137, 2003 U.S. App. LEXIS 19601 (Fed. Cir. Sept. 22, 2003) ..... 19

*California Federal Bank v. United States*, 245 F.3d 1342 (Fed. Cir. 2001) ..... 19

*Castle v. United States*, 301 F.3d 1328 (Fed. Cir. 2002), *cert. denied*, 123 S. Ct. 2572 (2003) ..... 19

*Coast Federal Bank v. United States*, 323 F.3d 1035 (Fed. Cir. 2003) ..... 19

*Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986) ..... 21, 22

*Glass v. United States*, 258 F.3d 1349 (Fed. Cir. 2001) ..... 19

*Glendale Federal Bank v. United States*, 239 F.3d 1374 (Fed. Cir. 2001) ..... 19

*Kaiser Aetna v. United States*, 444 U.S. 164 (1979) ..... 23, 24, 25

*Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949) ..... 21, 22

*Landmark Land Co. v. FDIC*, 256 F.3d 1365 (Fed. Cir. 2001) ..... 11

*Miller v. Robertson*, 266 U.S. 243 (1924) ..... 17

*Mobil Oil Exploration & Producing Southeast, Inc. v. United States*, 530 U.S. 604 (2000) ..... 4, 18

*Mosser v. Darrow*, 341 U.S. 267 (1951) ..... 27

TABLE OF AUTHORITIES – Continued

Page

*North Carolina v. Rice*, 404 U.S. 244 (1971) ..... 15

*Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978) ..... 22

*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) ..... 22

*Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) .... 22, 25

*Security Sav. & Loan Ass'n v. United States*, 26 Cl. Ct. 1000, *aff'd*, 245 F.3d 1342 (Fed. Cir. 1992) ..... 5

*Security Sav. & Loan Ass'n v. Director, OTS*, 960 F.2d 1318 (5th Cir. 1992) ..... 5

*Security Sav. & Loan Ass'n v. Director, OTS*, 761 F. Supp. 1277 (S.D. Miss. 1991) ..... 5

*Stevens v. Department of the Treasury*, 500 U.S. 1 (1991) ..... 11

*Suess v. United States*, 54 Fed. Cl. 606 (2002) ..... 16

*Suess v. United States*, 52 Fed. Cl. 221 (2002) ..... 8

*Tumey v. Ohio*, 273 U.S. 510 (1927) ..... 27

*United States v. General Motors Corp.*, 323 U.S. 373 (1945) ..... 22

*United States v. Interstate Commerce Comm'n*, 337 U.S. 426 (1949) ..... 14, 15

*United States v. Nixon*, 418 U.S. 683 (1974) ..... 14

*United States v. Pewee Coal Co., Inc.*, 341 U.S. 114 (1951) ..... 21

*United States v. Winstar Corp.*, 518 U.S. 839 (1996) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

*Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083 (1991) ..... 11

*Ward v. Village of Monroeville*, 409 U.S. 57 (1972) ..... 27

*Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985) ..... 27

OTHER

U.S. CONST. art. III, § 2 ..... 1, 4

U.S. CONST. amend. V ..... 1

12 U.S.C. § 1441a(m)(1)-(2) ..... 6

12 U.S.C. § 1821a(a)(1) ..... 6

12 U.S.C. § 1821(a)(2)(A) ..... 6

12 U.S.C. § 1821(d)(11) ..... 6

12 U.S.C. § 1821(d)(11)(A) ..... 1

12 U.S.C. § 1821(g)(1) ..... 1, 6

28 U.S.C. § 1254 ..... 1

Financial Institutions Reform, Recovery and Enforcement Act, Pub. L. 101-73, 103 Stat. 183 ..... 2

CORBIN ON CONTRACTS § 997 ..... 18

FARNSWORTH ON CONTRACTS 2d § 12.14 ..... 18

RESTATEMENT OF CONTRACTS 2d § 351 ..... 18

## PETITION FOR A WRIT OF CERTIORARI

Petitioners H.C. Bailey, Jr., *et al.*, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

## OPINIONS BELOW

The opinion of the court of appeals is reported at 341 F.3d 1342 (Fed. Cir. 2003), and is reprinted in the appendix hereto ("App.") at App. 1a-10a. The order of the court of appeals denying rehearing and rehearing *en banc* is reprinted at App. 77a. The opinions of the Court of Federal Claims are reported at 53 Fed. Cl. 251 (2002), 53 Fed. Cl. 31 (2002), 51 Fed. Cl. 265 (2001), and 47 Fed. Cl. 2 (2000), and are reprinted at App. 11a-24a, 25a-28a, 29a-58a, and 59a-76a, respectively.

## JURISDICTION

The court of appeals entered judgment on August 27, 2003, and entered an order denying rehearing and rehearing *en banc* on October 28, 2003. This Court has jurisdiction under 28 U.S.C. § 1254.

## PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant provisions of Article III, Section 2 of the United States Constitution, the Fifth Amendment, and the Financial Institutions Reform, Recovery and Enforcement Act, Pub. L. 101-73, 103 Stat. 183, 12 U.S.C. §§ 1821(d)(11)(A) and (g)(1), are reprinted at 80a-81a.

## STATEMENT

This case arises from the Government's breach of two regulatory capital contracts with Security Savings and Loan Association ("Security") of Jackson, Mississippi,

similar to those before the Court in *United States v. Winstar Corp.*, 518 U.S. 839 (1996). Under these contracts, the Government promised to permit Security to count over $30 million in supervisory goodwill, capital credits, and Income Capital Certificates as regulatory capital. As in *Winstar*, the Government breached the contracts by enacting and enforcing the Financial Institutions Reform, Recovery and Enforcement Act, Pub. L. 101-73, 103 Stat. 183 ("FIRREA"), in 1989. As a direct result of this breach, Security failed to satisfy its minimum regulatory capital requirements, and the Government seized it, placing it in the hands of the Federal Deposit Insurance Corporation ("FDIC") as receiver. The FDIC, in turn, liquidated the thrift, which resulted in a receivership deficit of $71 million, the vast bulk of which ($66 million) represented the Government's own costs as insurer of Security's deposits.

In the proceedings below, Petitioners (the former shareholders of Security) asserted that but for the Government's breach, Security would not have been seized and would have been worth no less than $44 million. And had Security not been seized, there would have been no receivership, and the FDIC would not have incurred any liquidation or other costs, which it estimates at approximately $71 million as of December 2000. App. 3a. In light of these facts, which were taken as true for purposes of the Government's summary judgment motions, Petitioners maintained that the proper measure of expectation damages flowing to Security's receivership estate should be at least $115 million – the difference between Security's actual position (negative $71 million) and the position it would have occupied but for the breach (positive $44 million). Following application of the statutory priority scheme (under which the FDIC's subrogated claim for receivership costs is senior to Petitioners' claims on the receivership estate), *see* App. 34a-35a, Petitioners argued, the $44 million surplus remaining after satisfaction of the $71 million receivership deficit should flow to them.

The Federal Circuit rejected Petitioners' claim as a matter of law, holding that Article III of the Constitution barred any recovery of contractual damages. First, the court of appeals held that the receivership deficit could not be included as a component of contract damages even if the Government's loss was a direct and foreseeable result of the Government's breach of its contract with Security. The court explained that the receivership deficit consists largely of the FDIC's own subrogated claim against Security's receivership estate for funds (with interest) advanced by FDIC, from the FSLIC Resolution Fund ("FRF"), to cover the Government's losses as deposit insurer and other liquidation costs. FDIC valued its subrogated claim at $66.4 million as of October 2001. App. 3a. The FDIC, however, is also the real party in interest on the other side of the "v.," for it would be obliged to pay, with funds from the FRF, any judgment against the United States for breach of contract. App. 40a. As a result, if the court awarded the $71 million receivership deficit as a component of consequential contract damages to Security's receivership estate, $66 million of the award would flow from FDIC, as manager of the FRF, through Security's estate, back to FDIC and into the FRF in satisfaction of the FDIC's subrogated claim. Viewing this circular component of contract damages in isolation from the overall claim, the courts below held it unrecoverable. As the trial court explained: "Because the FDIC, a government agency, is paying itself, the receivership deficit claim is a non-justiciable intra-governmental controversy." App. 40a.

Second, the Federal Circuit held that the claimed positive value of Security (i.e., $44 million) likewise was not recoverable by Security's receivership estate "because it . . . is exceeded by the [FDIC's] $66 million" claim for the Government's own losses. App. 6a. Reasoning that any damages awarded to Security's estate would, under the statutory priority scheme, have to be paid first to satisfy the FDIC's subrogated claim, the court concluded that Petitioners' claimed damages of $44 million would be

consumed entirely by the FDIC's senior subrogated claim of $66 million, leaving nothing for Petitioners for the loss of their thrift. Accordingly, "[t]he [remaining] expectation damage claim is therefore [also] a nonjusticiable intra-governmental dispute because any damage award recovered from the government by the FDIC [as receiver for Security] would flow to the FRF, from one government coffer to another. Thus, the claim lacks adversaries and consequently does not satisfy the Article III, § 2, case or controversy requirement." App. 6a (internal citations omitted).

In other words, according to the courts below, because the Government is barred by Article III from recovering its own contract damages from itself, any damages redressing Petitioners' loss from the Government's breach must first be paid, under the statutory priority scheme, back to the Government to satisfy the very damages that the Government cannot recover from itself. This breathtaking result contradicts this Court's repeated instruction that "'[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.'" *Mobil Oil Exploration & Producing Southeast, Inc. v. United States*, 530 U.S. 604, 607 (2000) (quoting *Winstar*, 518 U.S. 839, 895 (1996) (plurality opinion)). Beyond that, it makes a mockery of this Court's decision in *Winstar*, all but eviscerating the claims vindicated there whenever the Government's breach inflicted sufficient damage to result in the seizure of the thrift. It is more than passing strange that the Government must pay damages in cases where its breach of contract only maimed, but did not kill, its contracting partner, and yet avoids liability entirely in cases where its actions led to a total loss, all on the theory that the Government's own collateral damage as deposit insurer absolves it of responsibility to the thrift and its owners.

And the effective result of this reasoning is that damages reflecting a loss of $44 million in value owned by

Petitioners ended up in the Government's pockets, even though it was the Government that breached the contract and caused the damage in the first place. This stark result can only be described as a taking of Petitioners' property without just compensation. But the courts below rejected Petitioners' taking claim as well.

## I. PROCEDURAL BACKGROUND

Following the enactment of FIRREA, Security brought suit in the District Court for the Southern District of Mississippi seeking an injunction prohibiting the Government from enforcing FIRREA in a manner contrary to Security's contractual rights. The court entered the injunction, holding that the contracts granted Security a right to regulatory capital that survived the enactment of FIRREA. *Security Sav. & Loan Ass'n v. Director, OTS*, 761 F. Supp. 1277, 1283-85 (S.D. Miss. 1991). The Fifth Circuit reversed, however, holding that FIRREA was intended to abrogate the contracts and that any claim for compensation must be brought in the Court of Federal Claims ("CFC"). 960 F.2d 1318, 1323 (5th Cir. 1992). The case was transferred to the CFC, which rejected Security's request for injunctive relief for lack of jurisdiction. *Security Sav. & Loan Ass'n v. United States*, 26 Cl. Ct. 1000, 1003-04, *aff'd*, 245 F.3d 1342 (Fed. Cir. 1992). The Office of Thrift Supervision ("OTS") seized Security shortly thereafter. In view of the procedural posture of this case (described below), it must be accepted as true that Security would not have been seized but for the Government's breach, and would have been worth at least $44 million.

FDIC occupies three distinct roles in this lawsuit. First, acting as receiver for and successor-in-interest to Security, FDIC has advanced Security's breach of contract claims as a plaintiff against the United States in the courts below. *See* App. 30a-34a (describing complicated series of intra-governmental transactions by which FDIC obtained control of Security's contract claims). After the

trial court permitted FDIC's predecessor to take over Security's breach of contract claims, Petitioners brought their own action in the Court of Federal Claims, and the suits were subsequently consolidated. App. 31a n.2.[1]

Second, in its capacity as manager of the portion of FRF that received all of the assets and liabilities of the RTC pursuant to 12 U.S.C. § 1441a(m)(1)-(2), the FDIC holds the Government's subrogated claim, with accrued interest, against the Security receivership estate. *See* App. 3a, 34a. Under the statutory priority scheme, the FDIC's subrogated claim is senior to Petitioners, the former shareholders of Security. *See* App. 34a-35a; 12 U.S.C. §§ 1821(d)(11) and (g)(1).

Third, in its capacity as manager of the portion of the FRF that received all of the assets and liabilities of the FSLIC pursuant to 12 U.S.C. § 1821a(a)(1), (a)(2)(A), the FDIC also will be liable to pay any judgment entered against the United States as defendant in this case. App. 35a.

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[1] The Government moved to dismiss Petitioners' breach of contract claim, arguing that the shareholders could not bring a derivative suit because "the FDIC as successor to Security – is bringing suit on behalf of the corporation." App. 65a. The Court of Federal Claims rejected that argument, holding that "'[s]hareholder plaintiffs suing derivatively . . . have a direct, vested interest in the surplus of potential recoveries and, therefore, have standing to remain as plaintiffs in these actions notwithstanding FDIC's intervention on behalf of the failed thrifts.'" App. 65a-66a (quoting *Plaintiffs in All Winstar-Related Cases v. United States*, 44 Fed. Cl. 3, 10 (1999)). The Government challenged this ruling on appeal, but the Federal Circuit apparently rejected the Government's submission as well, for the court ruled on the merits of Petitioners' derivative contract claim, holding summarily that "[b]y its contingent nature, Bailey's contract claim fails with the FDIC's." App. 7a (citing *First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279, 1288 (Fed. Cir. 1999)). The court of appeals did hold that Petitioners could not recover directly for breach of contract as third party beneficiaries, *see* App. 6a-7a, and Petitioners do not challenge that ruling here.

In sum, then, in this breach of contract action, the FDIC (i) is a plaintiff in its role as Security's receiver; (ii) has a priority claim on any judgment entered against the United States as a result of its subrogated claim to recover amounts advanced by the FRF to fund the receivership deficit, which arose solely as a direct consequence of the Government's breach of contract; and (iii) is the defendant obliged, in its role as manager of FRF, to pay any judgment entered against the United States for breach of contract.

## II. THE COURT OF FEDERAL CLAIMS' DECISIONS

In May 2000, the CFC entered summary judgment as to liability for breach of contract in favor of Petitioners and the FDIC, holding that "Security Savings entered into a contract with the government to permit the thrifts to count supervisory goodwill and certain other items . . . in computing their regulatory capital requirements, and that the passage of FIRREA and its implementing regulations breached those contractual commitments." App. 75a. In two subsequent summary judgment rulings, however, the CFC held that the Government need not pay any damages to either Petitioners or the receivership estate.

### A. The Contractual Ruling

Following the completion of discovery, the Government moved for summary judgment as to damages on the contract claims advanced by Petitioners and by FDIC as successor to Security. In December 2001, the CFC granted the motion, holding that the contractual goodwill claims must be dismissed "due to the absence of a case or controversy between [FDIC] and the United States. Consequently, the [Petitioners'] contingent goodwill claims are extinguished." App. 30a. The court reached this holding on the basis of a two-step course of reasoning.

The trial court first held that the receivership deficit, consisting primarily of the $42.6 million subrogated claim advanced by FDIC (with interest, $66 million as of October 31, 2001), could not be recovered as an element of expectancy damages. App. 38a-39a. The court offered two reasons for this conclusion. First, the court accepted the Government's argument that FDIC, as receiver of Security's estate, cannot recover the receivership deficit "because the subrogated claim of the [FDIC] cannot be, properly speaking, a claim of Security Federal, but remains, as it was prior to its liquidation, an obligation of Security Federal to its depositors, which it now owes to the [FDIC] as subrogee." App. 39a-40a. The trial court did not explain how this conclusion could be squared with the assertions of Petitioners and the FDIC (which must be accepted as true on summary judgment) that the FDIC's subrogated claim constitutes a liability of *Security's estate* that was directly and foreseeably caused by the Government's breach, and hence should be recoverable as consequential damages. Indeed, the court simply ignored the fact that, absent the Government's breach of the regulatory capital contract, Security would not have been seized and would have had *positive value*,[2] and the Government's $66 million loss would never have been incurred.

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[2] In the courts below, Petitioners and FDIC advanced a "debanking" theory of expectancy damages that yielded a positive value of $140.4 million for Security Savings through 1998. App. 37a. The courts below rejected this theory for reasons unrelated to the questions presented here, App. 5a; App. 41a-44a, and Petitioners do not seek review of that conclusion from this Court. Rather, Petitioners have advanced the more modest theory of damage, accepted by the CFC in *Suess v. United States*, 52 Fed. Cl. 221, 230-31 (2002), in which the court awarded contract damages based on the franchise value of the thrift, subsequently seized as a result of the Government's breach of contract, at the time of the breach. In this case, the corresponding figure is approximately $44 million.

Second, the trial court held that neither Petitioners nor FDIC could recover the receivership deficit damages as a result of "the FRF's position as both payer of judgments, and as creditor in this action." App. 40a. Because payment of the receivership deficit damages to Security's estate would merely "be a transfer of funds from one portion of the FRF's accounting ledger to another," the court held that "the receivership deficit claim is a non-justiciable intra-government controversy." App. 40a.

Having concluded that the receivership deficit could not properly be included within expectancy damages, the trial court held that Article III barred judicial consideration of the contract claims advanced by FDIC. The court explained that "[t]he subrogated claim of the [FDIC] against Security Federal exceeds the $64 million that remains from FDIC's expectancy damage claim as of year-end 1994, excluding the receivership deficit component which is unrecoverable for the reasons stated above." App. 44a-45a. The court further held that this reasoning extinguished Petitioners' contract claim because, given the court's elimination of the receivership deficit component of expectancy damages, "there is no possibility of any surplus recoveries that they can receive." App. 47a.

### B. The Takings Ruling

Following the trial court's ruling on the contract claim, the Government moved for summary judgment on Petitioners' takings claim. Petitioners argued that if Article III, the statutory priority scheme for the distribution of contract damages awarded to a receivership estate, and the FDIC's tri-partite roles as plaintiff-receiver, senior creditor of the receivership estate, and defendant somehow combined to extinguish Petitioners' right to recover contract damages for the loss of the thrift seized as a direct result of the Government's breach, as the CFC had held, then their property had been taken without just compensation. The CFC rejected this argument and granted the

Government's motion for summary judgment. *See* App. 11a-12a.

After holding that Petitioners could not claim that the thrift they owned had been taken, the trial court reasoned that Petitioners' property interest in the potential surplus flowing from Security's contract claim was not taken. Although its prior ruling that the receivership deficit could not be included in expectancy damages had effectively "zeroed out" Petitioners' property interest, App. 23a, the CFC nevertheless held that Petitioners "were never deprived of their property interest in a contractual remedy." App. 24a.

## III. THE FEDERAL CIRCUIT'S DECISION

### A. The Contractual Ruling

The Federal Circuit affirmed, holding that neither Petitioners nor the FDIC had standing to advance Security's breach of contract claim against the Government. The court ruled that the contract claim was "a nonjusticiable intra-governmental dispute because any damage award recovered from the government by the FDIC would flow to the FRF, from one government coffer to another. Thus, the claim lacks adversaries and consequently does not satisfy the Article III, § 2, case or controversy requirement." App. 6a (internal citations omitted).

The court reasoned that under the statutory priority scheme, the FDIC's subrogated claim of $66 million would have to be satisfied first out of any expectancy damages awarded against the Government. And because neither the FDIC's contract claim nor Petitioners' $44 million claim for the positive value of the seized thrift[3] exceeded the FDIC's

[3] The Federal Circuit suggested that Petitioners raised the argument that their net contract damages should be the $44 million value of the thrift for the first time on appeal. App. 6a. The court was

(Continued on following page)

$66 million subrogated claim, any damages awarded against the Government would be paid back to the Government. App. 6a. This ruling, in turn, was premised on the court's rejection of Petitioners' (and the FDIC's) argument that the calculation of expectancy damages should include *both* the amount of the receivership deficit *and* the positive value of the seized thrift, given that both losses were caused directly by the Government. Citing its earlier decision in *Landmark Land Co. v. FDIC*, 256 F.3d 1365, 1380 (Fed. Cir. 2001), the Federal Circuit explained that the receivership deficit could not be included in contract damages because "[t]he claim for the recovery of the receivership deficit is predominantly held by the FRF because the largest portion of it is that which was absorbed by the RTC when it paid Security Federal's deposit liabilities." App. 5a.[4]

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mistaken: Plaintiffs asserted claims based on the value of the thrift repeatedly before the CFC. Two of many examples include (a) Shareholder Plaintiff's Opposition to Defendant's Motion for Summary Judgment (8/31/99) at 23 & n.12, 39 & n.23, and (b) Memorandum in Support of Shareholders Plaintiffs Motions For Partial Summary Judgment (12/28/01) at 26-28. In any event, the court of appeals addressed and rejected the argument on the merits. App. 6a. Accordingly, there can be no question that the issue is fully preserved for this Court's review. *See Virginia Bankshares, Inc. v. Sandberg, Inc.*, 501 U.S. 1083, 1098-99 n.8 (1991) ("It suffices for our purposes that the court below passed on the issue presented.") (citation omitted); *Stevens v. Department of the Treasury*, 500 U.S. 1, 9 (1991).

[4] While the CFC had offered two rationales for its ruling that the receivership deficit could not be included in the contractual expectancy damages claim, the Federal Circuit limited its holding to the second – that it raised a non-justiciable intra-governmental dispute because the receivership estate would be required to pay the first dollars recovered back to the FRF in satisfaction of the Government's subrogated claim. The court of appeals clearly did not rely upon the trial court's first rationale – that the receivership deficit is not includable in expectancy damages as a matter of contract law – for it extended its holding to FDIC's taking claim, *see* App. 7a, a result that only makes sense if the

(Continued on following page)

### B. The Takings Ruling

The Federal Circuit also affirmed the judgment against Petitioners on their takings claims. The court rejected Petitioners' claim that the enactment and enforcement of FIRREA in breach of the Government's contractual promise effected a regulatory taking of their thrift, explaining that "[i]t was not the thrift, or its stock, that was allegedly taken, but the contractual right" to regulatory capital. App. 8a (internal citation omitted). Because Petitioners were not parties to the contracts, the court reasoned, they could not advance that claim. "Moreover," the court concluded, "we have already decided that the seizure of thrifts 'for failure to comply with the regulatory requirements imposed by FIRREA' does not constitute a regulatory taking because [Petitioners], through the FDIC, [were] not deprived of a contractual remedy for the government's breach to recover the thrift's assets." App. 8a (quoting *Castle v. United States*, 301 F.3d 1328, 1341 (Fed. Cir. 2002), *cert. denied*, 123 S. Ct. 2572 (2003)).

The court of appeals also rejected Petitioners' claim that their property interest in the surplus had been taken. Although the court acknowledged that Petitioners possessed this property interest, it reasoned that "under the analysis above, the receivership deficit is not available for derivative recovery by [Petitioners]." App. 9a. As a result, "the receivership deficit exceeds the estimated damages award here, [and] there is no recovery for [Petitioners] simply because there is no liquidation surplus." App. 9a.

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Federal Circuit had concluded that the claim for recovery of the receivership deficit was non-justiciable under Article III.

## REASONS FOR GRANTING THE WRIT

### I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S ARTICLE III JURISPRUDENCE.

Petitioners' interests are indisputably adverse to those of the United States: Petitioners allege (and this Court must accept as true) that an award of contract damages against the United States in an amount calculated to put Security's estate in the position it would have occupied but for the Government's breach would yield a surplus of not less than $44 million payable to Petitioners. Yet the court of appeals held that Petitioners' claim against the Government was extinguished by the intra-governmental dispute doctrine. The court reasoned, first, that the receivership deficit must be excluded from Security's contractual claim on the ground that the Government cannot recover its own $66 million subrogated claim from itself. And because the priority statute requires the receivership estate to pay the Government's $66 million subrogated claim before making any other distributions, an award of $44 million for the value of the seized thrift would have to be paid not to Petitioners, but to the Government itself. So, the court of appeals reasoned, Petitioners' $44 million claim was also an intra-governmental dispute because it was less than the FRF's $66 million subrogated claim. As if by magic, the court of appeals' sleight of hand has made Petitioners' property "vanish[] into thin air." *Armstrong v. United States*, 364 U.S. 40, 48-49 (1960).

The end result of the court's stunning exercise of fuzzy math is that the Government need not pay the damages that would indisputably be due and owing upon the application of ordinary principles of contract law solely because (i) the Government's breach was the direct and foreseeable cause of consequential damages to the Government itself, in addition to the losses suffered by Petitioners; (ii) the Government cannot recover its losses from itself; (iii) the priority statute requires that the Government's own losses be repaid before Petitioners are compensated;

and (iv) a damages award of $44 million for Petitioners' losses would be consumed entirely by the Government's prior subrogated claim of $66 million.

The court below thus analyzed justiciability on a piecemeal basis, asking whether one component of the damages claim presented a non-justiciable intra-governmental dispute rather than examining the whole of the contract claim. This myopic divide-and-conquer focus on one small step in a larger controversy between two adversaries is foreclosed by this Court's leading precedent governing the applicability of the intra-governmental dispute doctrine. In *United States v. Interstate Commerce Comm'n*, 337 U.S. 426 (1949), the United States had brought an administrative proceeding before the Interstate Commerce Commission ("ICC"), claiming that it had been charged excessive railroad rates in violation of the Interstate Commerce Act. The ICC rejected the Government's claim on the merits, and in accordance with the governing statute, the United States brought suit in federal district court against the ICC and against itself. *Id.* at 429. The three-judge district court dismissed for lack of jurisdiction, reasoning that the Government could not sue itself.

This Court reversed. Acknowledging "the long-recognized general principle that no person may sue himself," the Court nevertheless held that substance, not form, governs the issue of justiciability. *Id.* at 430; *see also United States v. Nixon*, 418 U.S. 683, 693 (1974) ("The mere assertion of a claim of an 'intra-branch dispute,' without more, has never operated to defeat federal jurisdiction; justiciability does not depend on such a surface inquiry."). In substance, "[t]he basic question is whether the railroads have illegally exacted sums of money from the United States." *ICC*, 337 U.S. at 430. The Court recognized that, under the governing statute, "[t]o collect the alleged illegal exactions from the railroads," the Government was required to institute the ICC proceedings and then bring suit against the ICC and itself. But that in

no way changed the substance of the overall controversy: "This suit therefore is a step in proceedings to settle who is legally entitled to sums of money, the Government or the railroads." *Id.*

Likewise in this case, even though the priority statute requires payment of the subrogated claim to the Government before any distribution is made to Petitioners, the receivership estate's recovery of the receivership deficit as part of expectancy damages from the Government is merely "a step in the proceedings to settle who is legally entitled to sums of money, the Government or [Petitioners]." *Id.* Thus, resolution of the claim advanced by Petitioners and the FDIC that expectancy damages in this case properly include the receivership deficit (for it is foreseeable consequential damage that Security's receivership estate would not have incurred but for the breach) does not constitute "the academic pastime of rendering judgments in favor of persons against themselves." *ICC*, 337 U.S. at 430. Rather, it is an integral step, as in *ICC*, in the proceedings to determine the amount of damages caused to Petitioners as a result of the Government's breach of its contract with Security.

This Court has repeatedly emphasized that "[t]o be cognizable in a federal court, a suit . . . 'must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.'" *North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-241 (1937)). Clearly, Petitioners' derivative breach of contract claim on behalf of Security against the United States – seeking the expectancy damages allegedly owed to the bank, and through the bank to Petitioners, its shareholders – meets these requirements. Article III requires no more, and it certainly does not erect a substantive defense for the benefit of the United States against otherwise meritorious breach of contract claims.

## II. THE RULING BELOW EVISCERATES THIS COURT'S DECISION IN *WINSTAR*.

One particularly egregious consequence of the Federal Circuit's decision is that it all but erases this Court's ruling in *Winstar*, negating it in nearly all of those cases (like two of the three before the Court in *Winstar*) in which "the Government exacerbated its breach when it seized and liquidated [the owners'] thrifts for regulatory noncompliance." *Winstar*, 518 U.S. at 870 (plurality opinion). As the plurality recognized, "many institutions [affected by the Government's breach] immediately fell out of compliance with regulatory capital requirements, making them subject to seizure by thrift regulators." *Id.* at 858. Indeed, some 46 *Winstar*-related cases brought in the Court of Federal Claims involved seized thrifts. The decision below effectively ensures that the Government will almost never be held to account for its breach in such cases because the damage it suffered as deposit insurer – the receivership deficit – will largely, if not entirely, eliminate the losses suffered by the owner of the thrift.[5]

The perversity of the result below is perhaps best illustrated by considering its application to the facts in one of the cases before the Court in *Winstar*. Glendale, which "was profitable and well capitalized, with a net worth of $277 million," had acquired Broward, "which then had liabilities exceeding the fair value of its assets by over

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[5] Petitioners are aware of only one seized thrift case that would be spared this perverse result because the receivership ran a modest surplus. *See Republic Savings Bank, FSB v. United States*, No. 92-265C (Fed. Cl.).

It bears noting that in one other case in which a failed thrift originally had a receivership surplus, as soon as the Court of Federal Claims awarded the thrift contract damages that would have flown through to the private shareholders, the Government sought to frustrate that award with an eleventh-hour claim from the IRS alleging that the receivership owed over *$1 billion* in taxes. *See Suess v. United States*, 55 Fed. Cl. 606 (2002).

$734 million." 518 U.S. at 862 (plurality opinion). Thus, on the day of the transaction, "the assumption of Broward's liabilities would have rendered Glendale immediately insolvent by approximately $460 million, but for Glendale's right to count goodwill as regulatory capital." *Id.* at 863. For that reason, the plurality concluded, "[i]t would, indeed, have been madness for respondents to have engaged in these transactions" absent the Government's regulatory capital promise, "for the very existence of their institutions would then have been in jeopardy from the moment their agreements were signed." *Id.* at 910.

The Federal Circuit's holding produces an equally mad result: if FIRREA had been enacted the day after the transaction, and Glendale seized as a result, any claim by the owners of Glendale for the loss of their $277 million thrift would be exceeded by the Government's self-inflicted loss of $460 million (a loss that would have been $277 million greater had Glendale not agreed to the transaction). As a result, under the Federal Circuit's reasoning, the claim for recovery of the loss of Glendale's value would constitute a nonjusticiable intra-governmental dispute. The holding below has thus eviscerated the result reached in *Winstar* by concluding that the victims of the Government (i) cannot include its own losses in the thrift's damages claim because it cannot recover damages from itself, but (ii) nonetheless must be reimbursed first for those very losses out of any damages that would otherwise have been recoverable by the non-governmental victims of its breach.

Ordinary rules of contract law, of course, require the opposite result. This Court has long acknowledged the settled rule of contract law that "[o]ne who fails to perform his contract is justly bound to make good all damages that naturally accrue from the breach, and the other party is entitled to be put in as good a position pecuniarily as he would have been by performance of the contract." *Miller v. Robertson*, 266 U.S. 243, 257 (1924). Thus, there is no doubt that a party that breaches its contract, understanding that the consequence thereof is to force the other party

into receivership, is ordinarily to be held liable for all natural and foreseeable costs related thereto.[6]

The exclusion of the receivership deficit from expectancy damages cannot be squared with these bedrock principles of contract law. As this case comes to the Court, it must be accepted as true that the Government's breach of its contract with Security directly and foreseeably caused the seizure of the bank, and that, absent the Government's breach, the thrift would have been worth no less than $44 million. Instead, Security's estate is $71 million in the hole. Under this Court's rule that contract claims against the United States are governed by ordinary rules of contract law, *see, e.g., Mobil*, 530 U.S. at 607, Petitioners were entitled to seek the full amount of Security's consequential damages: the difference between the positive value the thrift would have had absent the breach and the negative value it had as a result of the breach.

This result is particularly offensive when one considers that it flows from the combination of the Federal Circuit's misinterpretation of Article III, the FDIC's multiple roles, and the priority statute – so that a contract claim against a *non*-governmental defendant in parallel circumstances would not have been barred. This too contravenes a fundamental premise reaffirmed in *Winstar*:

> An even more serious objection is that allowing the Government to avoid contractual liability

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[6] *See, e.g.*, RESTATEMENT OF CONTRACTS 2d § 351 (1981) ("Loss may be foreseeable as a probable result of breach because it follows from the breach (a) in the ordinary course of events, or (b) as a result of special circumstances . . . that the party in breach had reason to know."); FARNSWORTH ON CONTRACTS 2d § 12.14, at 244 ("The party in breach need not have consented, even tacitly, to be liable for the loss; that party need only have been given notice of the facts that made it foreseeable."); 11-55 CORBIN ON CONTRACTS § 997 (2003) ("If the defendant in fact foresaw the injury and his conduct was planned to induce it, the fact that the train laid by him was a long one is immaterial.").

> merely by passing any "regulatory statute" would flout the general principle that, "when the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals."

518 U.S. at 895 (plurality opinion) (quoting *Lynch v. United States*, 292 U.S. 571, 579 (1934)).

At bottom, the courts below permitted the Government to avoid liability by seizing its contractual partner, and then asserting that its own self-inflicted losses barred recovery by its contracting partner's receivership estate. This ruling is utterly irreconcilable with the view articulated in *Winstar*: "[t]he greater the Government's self-interest, . . . the more suspect becomes the claim that its private contracting partners ought to bear the financial burden of the Government's own improvidence. . . ." 518 U.S. at 898 (plurality opinion).

Finally, the court of appeals' decision in this case is of a piece with a consistent body of post-*Winstar* Federal Circuit jurisprudence that has repeatedly denied plaintiffs any meaningful damages recovery in contravention of bedrock contract principles.[7] This pattern not only negates,

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[7] *See, e.g.*, *Coast Federal Bank v. United States*, 323 F.3d 1035 (Fed. Cir. 2003) (*en banc*) (holding, notwithstanding this Court's recognition in *Winstar* that capital credit promised by government was "permanent . . . credit to . . . regulatory capital," 518 U.S. at 866, that regulatory capital amortized away to zero through offsetting goodwill mechanism); *Castle v. United States*, 301 F.3d 1328 (Fed. Cir. 2002) (denying any restitutionary or reliance recovery to investors in thrift), *cert. denied*, 123 S. Ct. 2572 (2003); *Glass v. United States*, 258 F.3d 1349 (Fed. Cir. 2001) (holding plaintiffs to strict standard for recognition of third-party beneficiary status in government contract cases); *Glendale Federal Bank v. United States*, 239 F.3d 1374 (Fed. Cir. 2001) (refusing to allow restitution award premised upon benefit conferred on government through plaintiff's acquisition of failing thrift); *California Federal Bank v. United States*, 245 F.3d 1342 (Fed. Cir. 2001) (same); *Bank*

(Continued on following page)

piecemeal, this Court's teaching in *Winstar*, it also has broader ramifications, for it will have "the certain result of undermining the Government's credibility at the bargaining table and increasing the costs of its engagements." *Winstar*, 518 U.S. at 884 (plurality opinion).

## III. THE RULING BELOW IS CONTRARY TO THIS COURT'S TAKINGS JURISPRUDENCE.

Because it was reasonable for Petitioners to expect that the Government would not seize their property as a direct result of its own breach of contract, Petitioners validly stated a claim for just compensation under this Court's Takings Clause jurisprudence.

1. The Federal Circuit contradicted this Court's jurisprudence in holding that the Government's seizure of a regulated financial institution may not, under any circumstances, constitute a taking of property under the Fifth Amendment. After accurately stating that "Bailey argues that the government effected a regulatory taking *of his thrift* by enacting FIRREA and breaching the assistance agreements," the court of appeals then summarily concluded that "[i]t was not the thrift, or its stock, that was allegedly taken, but the contractual right" held by the thrift itself. App. 8a (internal citations omitted). That is simply not so. Prior to the breach, Petitioners owned property in the form of a thrift worth at least $44 million. As a direct result of the breach, Petitioners' thrift was taken. Thus, Petitioners are *not* seeking just compensation for the loss of property owned by the thrift – namely, the contractual right to treat supervisory goodwill and other assets as regulatory

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*United v. United States*, Nos. 02-5132 & 02-5137, 2003 U.S. App. LEXIS 19601 (Fed. Cir. Sept. 22, 2003) (unpublished) (rejecting several damages claims asserted by plaintiffs).

capital. Instead, they seek just compensation for the Government's seizure of *the thrift itself* – the entire enterprise – a seizure that would not have occurred but for the Government's breach of its contract with Security. As this Court has confirmed on numerous occasions, it simply cannot be denied that the seizure of an entire enterprise constitutes a taking of property under the Fifth Amendment. *See e.g. United States v. Pewee Coal Co., Inc.*, 341 U.S. 114 (1951); *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949).[8]

To be sure, where the Government seizes an enterprise that is subject to pervasive government regulation, and does so because that enterprise has failed to comply with those regulations, the seizure ordinarily will not trigger a just compensation requirement under the Fifth Amendment. As this Court has made clear, the Government's exercise of its regulatory powers will not give rise to a Fifth Amendment taking unless it violates "reasonable investment-backed expectations." *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 225 (1986). In the main run of cases, when the Government seizes a regulated financial institution for failing to meet its capital requirements, the just compensation requirement of the Fifth Amendment is not triggered because the owner of the institution should have "reasonably expected" that the institution would be subject to regulatory sanctions, including seizure, if it failed to satisfy those requirements.

But that obviously does not mean that there can *never* be a taking of a regulated financial institution. For

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[8] It cannot be the case that the Government can avoid the requirements of the Takings Clause while accomplishing precisely the same result – possession of literally all of the attributes of property ownership – that it sought to accomplish (albeit temporarily) in *Pewee Coal*, simply by seizing legal control over the *whole corporation*, rather than simply by seizing its assets directly.

example, if the Government decided that it must seize and control the largest commercial banks in the country in order to fight the war on terrorism, it cannot possibly be the case that it could avoid paying just compensation to the owners of those banks simply by first passing a regulation raising the applicable capital requirements to unachievable levels. Rather, it would have to pay just compensation to the owners of those banks just as surely as it would if it were seizing car factories or laundries. *See United States v. General Motors Corp.*, 323 U.S. 373 (1945); *Kimball Laundry v. United States*, 338 U.S. 1 (1949). The reason for this is plain: it is entirely reasonable for the owners of financial institutions to expect that the Government will not seize their demonstrably healthy banks without paying just compensation, and will not overhaul the definition of what it means to be a "healthy" institution as a pretext for such seizures of private property.

This Court's regulatory takings cases generally look at three factors: the character of the government action, the economic impact of the regulation on the claimant, and the extent to which the regulation has interfered with reasonable investment-backed expectations *See, e.g., Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978); *Connolly*, 475 U.S. at 225. In this case, the first two are obviously satisfied. The "economic impact" of the Government's seizure of Security was the immediate loss of the whole of Petitioners' property – a thrift worth at least $44 million. And the "character of the government action" in this case was an old-fashioned seizure of property, albeit for regulatory purposes. The governing inquiry is therefore whether Petitioners had a reasonable, investment-backed expectation sufficient to render the Government's seizure a compensable taking. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (regulation that goes "too far" will effect a taking).

Here, it bears repeating, but for the Government's breach of its regulatory capital contract, Security would not have been seized and Petitioners would still own the thrift today. Petitioners plainly had a reasonable, investment-backed expectation that the Government would not seize their thrift based solely upon regulatory noncompliance that was directly caused by the Government's breach of its regulatory capital contract. Petitioners reasonably expected that the Government either would keep its word, or, at a minimum, would promptly compensate the thrift for any breach of its promise, so as to prevent the thrift from falling out of regulatory compliance and becoming subject to seizure solely as a result of the breach.

This Court has consistently held that when the Government has itself *induced* reasonable investment-backed expectations, it must provide just compensation if it frustrates those expectations by subsequent changes in its policy. For example, the question in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), was whether the Government was free, without paying just compensation, to require open public access to a privately owned man-made pond. The owner of the pond had dredged it, converted it to a marina, and connected it to the navigable waters of the United States in reliance on the expectation that the pond and marina would remain private. The Court held that the federal government's subsequent creation of a public right of access to the pond, though an otherwise constitutional exercise of its pervasive power to regulate in navigable waters, constituted an uncompensated taking in violation of the Fifth Amendment.

Critical to this Court's judgment was the fact that the government agency, the Army Corps of Engineers, had awarded a dredging permit and allowed this costly project to go forward to completion before it demanded that free public access be provided. Although the background rule was that all waters connected to a navigable waterway were subject to a navigable servitude, the Court concluded

that the conduct of the Army Corps of Engineers created an expectation protected by the Takings Clause:

> We have not the slightest doubt that the Government could have refused to allow such dredging on the ground that it would have impaired navigation [in the adjacent waters], or could have conditioned its approval of the dredging on [the owners'] agreement to comply with various measures that it deemed appropriate for the promotion of navigation. But what [the owners] now have is a body of water that was private property under Hawaiian law, linked to navigable water by a channel dredged by them with the consent of the Government. While the consent of individual officials representing the United States cannot "estop" the United States . . . , it can lead to the fruition of a number of expectancies embodied in the concept of "property" – expectancies that, if sufficiently important, the Government must condemn and pay for before it takes over the management of the landowner's property.

*Id.* at 179 (internal citations omitted).

Unlike this case, *Kaiser Aetna* did not even involve a specific, bargained-for Government *promise* that the owner of the pond would be permitted to bar public access. Rather, the Government merely failed to condition its dredging permit on open public access or to otherwise disabuse the pond owner of its expectation, justifiably held at the time of the investment, that the pond would remain private. This failure was held sufficient to justify the owner's expectation that it would retain the property rights, including the right to exclude, that it clearly owned at the time of the investment. By contrast, Petitioners relied upon explicit contractual promises made by the Government to Security, which served to provide Petitioners with a concrete Government assurance that Security's

regulatory capital would be determined in accordance with the contract.[9]

*Kaiser Aetna* forecloses any claim that an investment premised on the Government honoring its express contractual promise entails the investor's assumption of a risk of noncompensable Government breach. If a property owner is protected by the Fifth Amendment even where there is no explicit Government contract, surely the property owner is entitled to just compensation when the Government's inducement came in the form of an express agreement, used by the Government to persuade the property owner to put its entire enterprise at risk based upon the reasonable expectation that the Government would keep its word.

Similarly, *Ruckelshaus v. Monsanto*, 467 U.S. 986 (1984), involved abrogation of Monsanto's government-induced expectation that the trade secrets it submitted to the EPA in the course of seeking registration for a new pesticide would not be disclosed to others. The Court found these expectations "overwhelming," and held that they alone "dispose[] of the taking question." *Id.* at 1005. The Court explained:

> [T]he Federal Government had explicitly guaranteed to Monsanto and other registration applicants an extensive measure of confidentiality and exclusive use. This explicit governmental guarantee formed the basis of a reasonable investment-backed expectation. If EPA . . . were now to disclose trade-secret data . . . EPA's actions would frustrate Monsanto's reasonable

[9] It is also noteworthy that, like the instant case, *Kaiser Aetna* involved an area pervasively regulated by the federal government: under the Commerce Clause, the long-established rule is that all waters connected to a navigable waterway are automatically subject to comprehensive regulations by federal authorities. 444 U.S. at 173.

> investment-backed expectation with respect to its control over the use and dissemination of the data it had submitted.

*Id.* at 1011.

The "explicit governmental guarantee" in *Monsanto* came in the form of a statutory scheme expressly providing that any qualifying trade secret information submitted to EPA would be protected from public disclosure by EPA. In other words, the decision in *Monsanto* protected a claimant that relied on nothing beyond a guarantee given to the public at large, rather than one made directly in a bilateral agreement with the claimant. Since Petitioners relied upon the *express contracts* between the Government and Security, rather than merely upon a general representation to the public, they clearly have an even stronger and more demonstrably reasonable investment-backed expectation than did the claimant in *Monsanto*.

In sum, by failing even to analyze whether Petitioners had a reasonable, investment-backed expectation that the Government would not seize their bank as a direct result of its own breached promise, the court of appeals ruled in direct defiance of this Court's Takings Clause jurisprudence.

2. The Federal Circuit also departed from this Court's Takings Clause precedents in holding that "the seizure of thrifts 'for failure to comply with the regulatory requirements imposed by FIRREA' does not constitute a regulatory taking because [Petitioners], through the FDIC, [were] not deprived of a contractual remedy for the government's breach to recover the thrift's assets." App. 8a (citation omitted). In other words, the court held that Petitioners' property was not taken because they are entitled to recover the value of their property through the thrift's contract damage action against the Government – pursued by the FDIC as receiver.

As an initial matter, the Government's obligation to pay just compensation to Petitioners obviously cannot be

constitutionally satisfied through a contract damages action that is itself controlled *by the Government*, in the form of the very agency – the FDIC – that would be obligated to pay any judgment owed to Petitioners. This Court has made clear that any remedial system for determining the just compensation owed to parties whose property has been taken must be "'reasonable, certain, and adequate.'" *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985) (citations omitted). A damages suit controlled by the very agency that caused the taking in the first place, and that would be required to pay any judgment, is hardly "reasonable, certain, and adequate." As Justice Jackson once put the point, in an opinion for the Court emphasizing that a bankruptcy trustee's conflict of interest with the bankrupt estate cannot be tolerated, "[t]his is not because such interests are always corrupt but because they are always corrupting." *Mosser v. Darrow*, 341 U.S. 267, 271 (1951).[10]

Moreover, as the Federal Circuit recognized, Petitioners had a property interest in the potential liquidation surplus of Security. At an absolute minimum, if Article III and the statutory priority scheme combine, as the Federal Circuit held, to effectively eliminate a liquidation surplus that would otherwise have flowed to Petitioners, they have suffered an independent taking of their property interest in the liquidation surplus, for which just compensation must be paid.

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[10] It would be a violation of the Due Process Clause for the government to compel a litigant to rely on a government agency as that litigant's exclusive legal representative in a case against the government itself. *Cf. Ward v. Village of Monroeville*, 409 U.S. 57, 61-2 (1972); *Tumey v. Ohio*, 273 U.S. 510, 523 (1927). In our adversary system, one's legal representative is supposed to be not merely neutral, but one's wholly committed *advocate*.

Again, it must be accepted as true that the Government's breach of contract foreseeably and directly caused the regulatory noncompliance and consequent seizure of a thrift institution then worth at least $44 million. It follows, under ordinary principles of contract law, that Petitioners' property interest in the liquidation surplus would have to be worth approximately $44 million. As explained above, the thrift's ordinary contract remedy against the Government would necessarily include *all* elements of damage foreseeably caused by the breach: the $44 million value of the seized thrift *plus* any damage caused to the Government, as deposit insurer, by its own breach, thereby allowing the $44 million to flow through to Petitioners as Security's receivership surplus.

This point can be brought into sharp focus by considering the implications of the following statute, hypothetically enacted as part of FIRREA:

> In any proceeding brought in the Court of Federal Claims to recover money damages for any loss foreseeably and directly caused by a breach of contract found to result from the provisions of this Act, any judgment awarding damages shall be reduced in an amount equal to the net liquidation costs and any other expenses incurred by the United States in connection with any receivership of a thrift institution seized as a result of the breach of contract.

The passage of such a statute would necessarily constitute a taking of Petitioners' property interest in the liquidation surplus of Security. The Federal Circuit's decision interprets Article III and the statutory priority scheme in a manner that accomplishes precisely this result; thus, if that interpretation is upheld, Petitioners' property interest in the liquidation surplus has necessarily been taken.

3. The Federal Circuit's takings analysis is also directly contrary to this Court's seminal decision in *Armstrong v. United States,* 364 U.S. 40 (1960). The *Armstrong*

petitioners had a state law lien for materials furnished to a government contractor. The contractor defaulted on its contract with the United States, which demanded that the contractor transfer the materials to the Government. The transfer rendered the liens unenforceable – under the special rule that the Government and its property are immune from suit. The lienholders argued that destruction of the lien constituted a taking, and the Court agreed:

> Before the liens were destroyed, the lienholders admittedly had compensable property. Immediately afterwards, they had none. This was not because their property vanished into thin air. It was because the Government for its own advantage destroyed the value of the liens, something that the Government could do because its property was not subject to suit, but which no private purchaser could have done. Since this acquisition was for a public use, however accomplished, whether with an intent and purpose of extinguishing the liens or not, the Government's action did destroy them and in the circumstances of this case did thereby take the property value of those liens within the meaning of the Fifth Amendment. Neither the boats' immunity, after being acquired by the Government, from enforcement of the liens nor the use of a contract to take title relieves the Government from its constitutional obligation to pay just compensation for the value of the liens. . . .

*Armstrong,* 364 U.S. at 48-49 (emphasis added).

Here, much as in *Armstrong*, Petitioners' property interest – whether viewed as the thrift itself or as the liquidation surplus – "vanished." As in *Armstrong*, the Government applied, "for its own advantage," the special rule arising from the Federal Circuit's understanding of Article III and the priority statute to pay the losses it inflicted on itself rather than those it inflicted on Petitioners – "something that the government could do . . . but

which no private [defendant] could do." *Armstrong* teaches that this course of action was a taking, whether accomplished with "an intent and purpose . . . or not," since the effect was to appropriate Petitioners' property for a public purpose – reducing the Government's share of the damages which were caused by its own breach.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

January 26, 2004

Respectfully submitted,

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**02-5170, 03-5005**

**UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT**

**341 F.3d 1342**

**August 27, 2003 Decided**

**COUNSEL**: Alan W. Perry, Forman Perry Watkins Krutz & Tardy, PLLC, of Jackson, Mississippi, argued for plaintiffs-appellants. Of counsel on the brief were Mary C. Gill and Craig H. Kuglar, Alston & Bird, LLP, of Atlanta, Georgia; and Laurence H. Tribe, Ralph S. Tyler Professor of Constitutional Law, Harvard University Law School, of Cambridge, Massachusetts.

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**JUDGES**: Before MAYER, Chief Judge, MICHEL and PROST, Circuit Judges.

**OPINION BY**: MAYER

**OPINION**: MAYER, Chief Judge.

H.C. Bailey, Jr., et al. (collectively "Bailey") and the Federal Deposit Insurance Corporation ("FDIC") appeal the judgment of the United States Court of Federal Claims dismissing their contract damages and Fifth Amendment takings claims. *Fed. Deposit Ins. Corp. v. United States,* 51 Fed. Cl. 265 (2001); *Fed. Deposit Ins. Corp. v. United States,* 53 Fed. Cl. 31 (2002); *Bailey v. United States,* 53 Fed. Cl. 251 (2002). Because the court correctly determined that neither party's claims allege an Article III case or controversy or *Fifth Amendment* taking, we affirm.

## Background

This is a Winstar-related case. In 1984, Security Savings and Loan Association ("Security Savings") acquired a failing thrift, New North Mississippi Federal Savings and Loan Association. *See Fed. Deposit Ins. Corp. v. United States,* 47 Fed. Cl. 2, 5 (2000). Bailey is a shareholder of Security Savings. In 1985, Bailey Mortgage Company, a subsidiary of Security Savings, acquired another failing thrift, Security Trust Federal Savings and Loan Association of Oak Ridge, Tennessee. In both transactions, the Federal Savings and Loan Insurance Corporation ("FSLIC") provided regulatory forbearances in assistance agreements whereby, inter alia, supervisory goodwill, cash contributions, and income capital certificates could be counted toward regulatory capital requirements.

After the passage of the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA"), Pub.L.

No. 101-73, 103 Stat. 183 (1989), and its implementing regulations, Security Savings could not meet its regulatory capital requirements and was seized by the Office of Thrift Supervision in 1992. The assets of Security Savings were passed to a new institution, Security Federal Savings and Loan Association ("Security Federal"); and the Resolution Trust Corporation ("RTC") became its receiver. *See* 12 U.S.C. § 1441a(b)(4)(A) (2000). In April of 1994, the RTC liquidated Security Federal and provided approximately $84.3 million in additional funds to cover deposit liabilities. This subrogated claim, the rights of which were now owned by the RTC, stood at $42.6 million in 1998 and $66.4 million as of October of 2001. The RTC was terminated in 1995 and its assets, including the subrogated claim, were transferred to the FSLIC Resolution Fund ("FRF"), *id.* § 1441a(m)(1)-(2), managed by the FDIC, *id.* § 1811(a)-(b). The FDIC also became the receiver of Security Savings' deficit, the "receivership deficit." *Id.* This deficit, which includes the subrogated claim owned by the FRF and other expenses including FDIC operating expenses, and taxes, totaled $68.2 million as of December of 1998, and with interest was $71.1 million as of December of 2000.

The FDIC and Bailey filed suit in the Court of Federal Claims against the United States for breach of the assistance agreements with the FSLIC by the enactment of FIRREA. In May of 2000, the court ruled that the government had breached its contracts with Security Savings, and that Bailey had a direct interest in any surplus recovery by the FDIC. *Fed. Deposit Ins. Corp.*, 47 Fed. Cl. at 4. The FDIC and Bailey submitted summary judgment motions with respect to damages under breach of contract and Fifth Amendment takings theories. The court dismissed

the FDIC's and Bailey's contract damages claims for lack of Article III standing and declined to bifurcate the FDIC's and Bailey's contract claims, *Fed. Deposit Ins. Corp.*, 51 Fed. Cl. at 273, 276; dismissed the FDIC's Fifth Amendment takings claim for lack of *Fed. Deposit Ins. Corp.*, 53 Fed. Cl. at 32; and dismissed Bailey's takings claim because Bailey had not been deprived of a contractual remedy. *Bailey,* 53 Fed. Cl. at 257. Bailey and the FDIC appeal and we have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3).

## Discussion

We review a grant of summary judgment by the Court of Federal Claims *de novo. Hercules Inc. v. United States,* 292 F.3d 1378, 1380 (Fed. Cir. 2002). We will affirm such a grant "when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Barseback Kraft AB v. United States,* 121 F.3d 1475, 1479 (Fed. Cir. 1997).

### I.

The FDIC and Bailey argue that they may recover expectancy damages of $208.6 million. This figure represents the receivership deficit of $68.2 million and the estimated value of Security's assets in the absence of the breach of the assistance agreements of $140.4 million in 1998, under a "debanking" theory. They assert that the court made two legal errors in its damages calculation.

First, they argue that the court erred by excluding the receivership deficit from the potential damages award. They contend that this liability is unfairly double-counted: counted once because it may not be recovered from the

government, and counted a second time because it must be repaid. This theory fails, however, because it is premised on the false assumption that the receivership deficit is an asset available for recovery by the FDIC for Security Savings. The claim for the recovery of the receivership deficit is predominantly held by the FRF because the largest portion of it is that which was absorbed by the RTC when it paid Security Federal's deposit liabilities. *See Landmark Land Co. v. Fed. Deposit Ins. Corp.*, 256 F.3d 1365, 1380 (Fed. Cir. 2001) ("[T]he government holds a claim against [the thrift] for an . . . amount paid by the RTC to [the thrift's] depositors . . . ."); *id.* at 1381 ("It is undisputed that [the failed thrift] owes the FRF over $1.5 billion for the advances that the FRF made to [the thrift's] depositors upon its liquidation.").

The FDIC and Bailey then argue that the court erred by rejecting Bailey's hypothetical "debanking" damages of approximately $140 million positive equity in 1998 and limiting it to $64 million as of 1994. The FDIC and Bailey explain that the non-breach provisions of FIRREA would have prevented Security Savings from continuing to engage in the thrift business while maintaining direct investments in real estate. They posit that Security Savings would have, inter alia, exited the thrift business and sold its retail banking deposits and branch offices in 1994, and established a holding company for direct investments in real estate and financial institutions. They assert that the present value of the hypothetical assets, $140 million at the estimated time of trial, is recoverable. The court reasoned that such a hypothetical holding company would not have retained the benefits of the assistance agreements after selling the thrifts, and that

therefore the government's contract liability to Security Savings would have ceased in 1994.

We decline to ruminate on the foreseeability of these "debanking" damages, but even if we accepted the theory, we agree with the court that the damages award must be assessed as of the time the bank would have ceded the benefit of the regulatory forbearances. *See Cal. Fed. Bank v. United States,* 245 F.3d 1342, 1349 (Fed. Cir. 2001) ("Profits on the use of the subject of the contract itself, here supervisory goodwill as regulatory capital, are recoverable as damages.") (emphasis added). Consequently, the breach of contract damages must be capped at the alleged 1994 figure of $64 million.

Neither Bailey nor any other private creditor could benefit if the FDIC fully recovered its alleged contract damage claims because the maximum potential award of $64 million is exceeded by the FRF's subrogated claim of $66 million. On appeal, Bailey asserts for the first time that he should be compensated $44 million, the value of the thrift in 1989. But this does not help him because it also is exceeded by the $66 million. The expectation damage claim is therefore a nonjusticiable intra-governmental dispute because any damage award recovered from the government by the FDIC would flow to the FRF, from one government coffer to another. *Landmark,* 256 F.3d at 1382. Thus, the claim lacks adversaries and consequently does not satisfy the Article III, § 2, case or controversy requirement. *Id.* The FDIC was properly dismissed for lack of standing.

Bailey does not contest the FDIC's dismissal, but asserts that he should be able to recover any surplus of expectancy damages directly from the government. This

claim, however, must be brought by the FDIC because Bailey in his capacity as a shareholder was not party to the assistance agreements. *See Glass v. United States,* 258 F.3d 1349, 1355 (Fed. Cir. 2001) ("Because the shareholders did not stand to directly benefit under the contract, they are at most incidental beneficiaries of the contract with no rights to enforce the contract against the United States."). By its contingent nature, Bailey's contract claim fails with the FDIC's. *See First Hartford Corp. Pension Plan & Trust v. United States,* 194 F.3d 1279, 1288 (Fed. Cir. 1999) (Shareholders possess "contingent interest in a liquidation surplus.").

II.

The FDIC argues that Security Savings as a viable entity was taken on August 9, 1989 with the passage of FIRREA. It theorizes that it may recover $64.5 million: the value of the thrift at the time, $14.8 million in equity and its receivership deficit of approximately $49 million. The FDIC contends that with interest the total exceeds $74 million. Under the analysis above, however, the receivership deficit may not be included in any recovery by the FDIC for Security Savings. And the remaining $14.8 million is exceeded by the amount owed to the FRF. Thus, the takings claim is also an intra-governmental claim, and was properly dismissed for lack of Article III standing.

Bailey argues that the court erred by rejecting his Fifth Amendment per se and regulatory takings theories. He argues that the government effected a per se taking of the thrift by enacting FIRREA and by seizing it in 1992. But "it is well established that it is not a taking for the government to close an insolvent bank and appoint a

receiver." *Branch v. United States,* 69 F.3d 1571, 1575 (Fed. Cir. 1995). We look to the cause of the insolvency, *see id.,* to determine whether the change in accounting treatment for goodwill constituted a per se taking, and conclude that it did not. We have already rejected the theory that regulatory assessments of liability fall into the category of per se takings. *Id.* at 1575 (rejecting the assertion that the seizure of a sister bank of a failed thrift under a cross-guarantee provision of FIRREA constituted a per se taking). And the same analysis appertains here. *See id.* at 1576 ("The principles of takings law that apply to real property do not apply in the same manner to statutes imposing monetary liability.").

Alternatively, Bailey argues that the government effected a regulatory taking of his thrift by enacting FIRREA and breaching the assistance agreements. It was not the thrift, or its stock, that was allegedly taken, *see First Hartford Corp.,* 194 F.3d at 1286, but the contractual right to treat goodwill, cash contributions, and income capital certificates as tangible assets. Bailey was not party to the assistance agreements; therefore this theory of an alleged taking of the contract is contingent and must be asserted by the FDIC. *See Glass,* 258 F.3d at 1355; *Castle v. United States,* 301 F.3d 1328, 1338-39 (Fed. Cir. 2002). Moreover, we have already decided that the seizure of thrifts "for failure to comply with the regulatory requirements imposed by FIRREA" does not constitute a regulatory taking because Bailey, through the FDIC, was not deprived of a contractual remedy for the government's breach to recover the thrift's assets. *Castle,* 301 F.3d at 1341; *id.* at 1342 (FIRREA did not take the FSLIC contract with the thrift because it "did not deprive the plaintiffs from a contractual remedy . . . plaintiffs retained the

full range of remedies associated with any contractual property right they possessed.").

Bailey, nevertheless, argues that his inability to recover the receivership deficit in combination with the statutory depositor preference priority scheme takes his contractual remedy to any surplus recovery. Bailey is correct that he has a property interest in any liquidation surplus. *See First Hartford Corp.,* 194 F.3d at 1287-88 (Shareholder possesses a cognizable property interest in eventual liquidation surplus arising under depositor preference statute whereby the receiver is directed to transfer any remaining funds to the depository institution's shareholders.). But under the analysis above, the receivership deficit is not available for derivative recovery by Bailey; and the application of the statutory priority scheme does not take his property interest in the surplus or his right to pursue the remedy. To the contrary, the statute preserves the right of the shareholders to a potential recovery, 12 U.S.C. § 1821(d)(11)(A)(v), and the FDIC has avidly pursued contract damages on behalf of Security Savings. But because the statute directs the receiver to repay receiver expenses, and other obligations subordinated to depositors or general creditors before the shareholders, *id.* § 1821(d)(11)(A)(i)-(iv), and the receivership deficit exceeds the estimated damages award here, there is no recovery for Bailey simply because there is no liquidation surplus.

## Conclusion

Accordingly, the judgment of the United States Court of Federal Claims is affirmed.

AFFIRMED.

**H.C. BAILEY, JR., et al., Plaintiffs, v. THE UNITED STATES, Defendant.**

**Nos. 92-577 C & 92-817 C (consolidated)**

**UNITED STATES COURT OF FEDERAL CLAIMS**

**53 Fed. Cl. 251**

**August 14, 2002, Filed**

**COUNSEL:** Mary C. Gill, Atlanta, GA, counsel of record for shareholder plaintiffs, Alan W. Perry, Jackson, MS, of counsel.

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**JUDGES:** EDWARD J. DAMICH, Chief Judge.

**OPINION BY:** EDWARD J. DAMICH

**DAMICH**, Chief Judge.

Before the Court are the Shareholder Plaintiffs' motion for partial summary judgment on their taking claim and Defendant's cross-motion for summary judgment as to the Plaintiffs' taking claim. On April 12, 2002, the Court granted Defendant's cross-motion as to takings with respect to the Federal Deposit Insurance Corporation ("FDIC") and dismissed the FDIC from the consolidated proceedings. For the reasons discussed below, the Shareholder Plaintiffs cannot establish that any property right was taken. Therefore, the Shareholder Plaintiffs' motion

for partial summary judgment is DENIED and Defendant's motion for summary judgment is GRANTED.

## I. Background

This is a long-standing *Winstar*-related case. The remaining plaintiffs are the shareholders of the failed Security Savings and Loan Association of Jackson, Mississippi ("Security Savings"). Previously, this Court has held that the Federal Savings and Loan Insurance Corporation ("FSLIC") breached contractual obligations that permitted Security Savings to count supervisory goodwill and certain other items, including FSLIC cash contributions and income capital certificates ("ICCs"), in computing its regulatory capital requirements. These contractual commitments were breached by the passage of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub. L. 101-73, 103 Stat. 183, and its implementing regulations. These contracts are discussed in further detail in the Court's opinion in *F.D.I.C. v. United States,* 47 Fed. Cl. 2, 4-5 (2000) ("*FDIC I*"). The Shareholder Plaintiffs have standing in this case to pursue their "direct, vested interest in the surplus of potential recoveries." *F.D.I.C. I,* 47 Fed. Cl. at 6 (quoting *Plaintiffs in All Winstar-Related Cases at the Court v. United States,* 44 Fed. Cl. 3, 10 (1999)). The FDIC appeared in this case as the successor-in-interest to Security Savings.

On December 21, 2001, this Court held that both the FDIC and the Shareholder Plaintiffs could not pursue their contractual claims. *F.D.I.C. v. United States,* 51 Fed. Cl. 265 (2001) ("*FDIC II*"). The FDIC lacked standing because, as manager of the FSLIC Resolution Fund ("FRF") which owns the damages claim of the failed

Security Savings and is also the largest creditor of the Security receivership, it could not present any theory of damages in its contractual claim that exceeded the FRF's subrogated claim against the Security receivership. *FDIC II,* 51 Fed. Cl. at 272-73. The FDIC damages claim did not exceed the FRF's claim against Security because, in part, the FDIC also could not recover for the receivership deficit of Security. The receivership deficit consists of the shortfall that occurred after Security Federal Savings and Loan Association ("Security Federal") – the successor of Security Savings that was operated under Resolution Trust Corporation ("RTC") conservatorship – was liquidated and after the RTC made deposit insurance payments for the benefit of the former depositors of Security Federal plus interest and tax liability. *FDIC II,* 51 Fed. Cl. at 269-70.

Because the FDIC lacked standing to pursue its damages claim, no surplus of recovery existed. Therefore, the Court ruled that the Shareholder Plaintiffs' contract claim, which was predicated on the existence of surplus recoveries, was extinguished. *FDIC II,* 51 Fed. Cl. at 273.

On April 12, 2002, this Court held in an unpublished opinion that the FDIC did not possess standing to pursue its taking claim because it could not present any theory of damages in its taking claim that exceeded the FRF's subrogated claim against the Security receivership. In addition, in the absence of contestation of the FDIC, the Court also dismissed the FDIC's due process claim against Defendant. The Shareholder Plaintiffs' taking claim is the only claim remaining in these consolidated proceedings.

## II. Shareholder Plaintiffs' Taking Theory

The Shareholder Plaintiffs present an unusual taking claim in which the interaction of certain provisions of FIRREA, the statutory priority scheme set forth in 12 U.S.C. § 1821(d)(11)(A) in which proceeds from failed thrifts collected by the FDIC, as manager of the FRF, are distributed, and several decisions by the U.S. Court of Appeals for the Federal Circuit and the Court of Federal Claims which have held that the FDIC cannot recover damages that are owed to the FRF, such as the receivership deficit,[1] combined together resulted in the taking of the contractual remedy to which the Shareholders were entitled. First, as stated above, FIRREA and its implementing regulations breached FSLIC's contractual obligation to Security Savings' goodwill claims. In addition, FIRREA abolished the breaching party in this case, FSLIC, and all of its assets and liabilities were transferred to its successor, the FSLIC Resolution Fund ("FRF"). 12 U.S.C. § 1821a(a)(1), (a)(2)(A). At the same time, FIRREA provided that, upon the termination of the RTC which previously owned the claims of Security Federal in this case, the FRF would also by operation of law own Security's breach of contract claim against the Government. 12 U.S.C. § 1441a(m)(1)-(2). The FRF is managed by the FDIC in its corporate capacity. 12 U.S.C. § 1811, 1821a(a)(1). Thus, FIRREA required the FDIC to assume conflicting roles in this case by controlling both the

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[1] *See Glass v. United States*, 258 F.3d 1349 (Fed. Cir.2001); *Landmark Land Co. v. United States*, 256 F.3d 1365 (Fed. Cir.2001); *Statesman Sav. Holding Corp. v. United States* 41 Fed. Cl. 1 (1998); *Hansen Bancorp, Inc. v. United States*, 49 Fed. Cl. 168, 177, n.12 (2001).

interest of the breaching party (FSLIC), and the interest of the breached party (Security Savings). In other words, the FDIC, as manager of the FRF, is in effect on "both sides of the 'v'" in this case.

To compound matters, the FRF also is the largest creditor of the Security receivership because it paid off Security's depositors when Security Federal was liquidated. As of December 21, 2002, the claim of the FRF against the Security receivership was approximately $66.4 million. *FDIC II,* 51 Fed. Cl. at 268. Thus, if a judgment were to be obtained against the Government in this case, the FDIC would distribute the proceeds in accordance with the statutory priority scheme. The priority scheme provides as follows:

> **(11) Depositor Preference**
>
> **(A) In general**
>
> Subject to section 1815(e)(2)(C) of this title, amounts realized from the liquidation or other resolution of any insured depository institution by any receiver appointed for such institution shall be distributed to pay claims (other than secured claims to the extent of any such security) in the following order of priority:
>
> (i) Administrative expenses of the receiver.
>
> (ii) Any deposit liability of the institution.
>
> (iii) Any other general or senior liability of the institution (which is not

> a liability described in clause (iv) or clause (v)).
>
> (iv) Any obligation subordinated to depositors or general creditors (which is not an obligation described in clause (v)).
>
> (v) Any obligation to shareholders or members arising as a result of their status as shareholders or members (including any depository institution holding company or any shareholder or creditor of such company).

12 U.S.C. § 1821(d)(11)(A).

Thus, if the FDIC obtained a judgment on its contract claims, first, pursuant to a contract of sale by which the RTC obtained Security's goodwill claims from the Security receivership, the FDIC would first pay the FRF the expenses it incurred in pursuing the goodwill claim, such as attorney's fees and any advances the FRF made to Security, including any interest. Def.'s Response to Order to Show Cause at App. 150-54. *See also* 12 U.S.C. § 1821(d)(11)(A)(i); 12 C.F.R. § 360.3(a)(1). Then, pursuant to the statutory priority scheme, the FDIC would use excess monies to pay the FRF for the deficit it incurred by paying off Security's depositors, including interest. 12 U.S.C. § 1821(d)(11)(A)(4); 12 C.F.R. § 360.3(a)(6), (7). Then, the FDIC would distribute remaining funds, if any, to other creditors of the Security Federal receivership pursuant to the statutory scheme. If any funds remained, these funds would be distributed to the Security Savings pass-through receivership pursuant to the October 16, 1992 purchase and assumption agreement between the

pass-through receivership and the RTC. Def.'s Response to Order to Show Cause at App. 125-26. The pass-through receivership has "subordinated debt" in the amount of $7,040,000 which mostly corresponds to $7 million in ICCs which would have to be satisfied. Pl's Mot. for Partial Summ.J. as to Takings at App.Ex 1, 14. Finally, if any funds remained, the shareholders of Security Savings would be the final creditors paid by the pass-through receivership. 12 U.S.C. § 1821(d)(11)(A)(v).

No other creditor is on a par with the FRF. Consequently, the FDIC would pay itself, as manager of the FRF and as receiver, in the amount of about $75 million. This amount includes (a) $66.4 million owed to the FRF as of October 31, 2000; (b) $7 million owed by the pass-through receivership to pay ICCs and (c) $1.7 million in expenses. See Def.'s Response to Order to Show Cause at App. 159-167. Barring a district court order to the contrary, the FDIC will use all of the funds to pay its own expenses and claims leaving the Shareholder Plaintiffs with no recovery if any judgment obtained in this case did not exceed the amount that the FDIC intended to pay itself.[2]

Any possibility that a judgment would exceed the amount that the FDIC intended to pay itself was thwarted by this Court's holding that the FDIC could not recover for the receivership deficit of Security Federal. The FDIC could not recover for the receivership deficit for two

[2] The Shareholder Plaintiffs argue that judicial review of the FDIC's acts as receiver might be precluded by 12 U.S.C. § 1821(d)(13)(D). Whether or not this Court even has the jurisdiction to make such a holding, it is unnecessary for the resolution of the parties' takings claims to consider this issue.

reasons. The first basis for denying recovery for the receivership deficit was because the FDIC has been vested with conflicting statutory roles in this case: its duty as successor to the receiver of Security Savings, 12 U.S.C. § 1441a(m)(1); as owner of the claims of Security Federal as manager of FRF-RTC, 12 U.S.C. § 1441a(m)(2); and as successor to the obligations of the breaching party FSLIC; and in its role as manager of FRF-FSLIC, 12 U.S.C. § 1821a(a)(1). *FDIC II,* 51 Fed. Cl. at 269-272. These conflicting roles demonstrated that any recovery of the receivership deficit obtained by the FDIC would signify nothing more than a payment from one pocket of the FRF to another pocket of the FRF, thereby presenting this Court with a nonjusticiable intra-governmental controversy. The second basis for the Court's holding was that the receivership deficit, representing the loss absorbed by the RTC when it payed off Security Federal's depositors, was never a proper claim of Security Federal. Insofar as the standing of FDIC in this case was predicated upon its status as successor-in-interest and not on its status as Security Federal's deposit insurer, the FDIC was not in the position to claim the receivership deficit. *Id.* at 270.

Because the FDIC was unable to pursue payments for the receivership deficit of Security, the dominos then began to fall. The FDIC was deprived of standing to pursue Security's contract claims because it was unable to pursue any theory of damages in which the FRF would pay anyone other than itself. Because the FDIC lacked standing to pursue the contract claims of Security, the Shareholder. Plaintiffs claim was extinguished for the lack of any surplus recovery. Thus, so the Shareholder Plaintiffs argue, the statutory priority distribution scheme combined with the conflicting roles of the FDIC in this case deprived

them of any contractual remedy to which they may have been entitled. Thus, the Shareholder Plaintiffs argue that their property right to a contractual remedy in this case was taken, and that they are entitled to just compensation under the Fifth Amendment.

The Shareholder Plaintiffs' theory offer two alternative theories describing which apparent property rights of theirs were taken. First, they argue that the property taken was the corporation of Security Savings itself because the corporation constitutes property of the shareholders under Mississippi law. Mississippi's corporate statute defines a "share" as "the unit into which the proprietary interests in a corporation are divided." Miss. Code Ann. § 79-4-1.40(22) (1972). Second, in the alternative, the Shareholder Plaintiffs argue that there has been a taking of the liquidation surplus, the Shareholders' rights in the contract claim of Security Savings.

## IV. Standard for Summary Judgment

Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. RCFC 56(c); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247, 106 S. Ct. 2505, 2509-10, 91 L. Ed. 2d 202 (1986); *Jay v. Secretary, DHHS,* 998 F.2d 979, 982 (Fed. Cir. 1993). The party moving for summary judgment bears the initial burden of demonstrating the absence of any genuine issue of material fact. After adequate time for discovery and on motion, summary judgment is appropriate against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, where that party will bear the burden of proof at trial.

*Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552-54, 91 L. Ed. 2d 265 (1986). The court must resolve any doubts about factual issues in favor of the non-moving party, *Chiuminatta Concrete Concepts, Inc. v. Cardinal Indus., Inc.,* 145 F.3d 1303, 1307 (Fed. Cir. 1998), and draw all reasonable inferences in its favor. *See Gasser Chair Co. v. Infanti Chair Mfg. Corp.,* 60 F.3d 770, 773 (Fed. Cir. 1995).

## V. Analysis

It is well established that, generally, governmental inference with a contractual right does not give rise to a taking, but instead entitles a plaintiff to seek compensation for breach of contract. *See Sun Oil Co. v. United States,* 215 Ct. Cl. 716, 572 F.2d 786 (1978). "Taking claims rarely arise under government contracts because the Government acts in its commercial or proprietary capacity in entering contracts, rather than its sovereign capacity. Accordingly, remedies arise from the contracts themselves, rather than from the constitutional protection of private property rights." *Hughes Communications Galaxy, Inc. v. United States,* 271 F.3d 1060, 1070 (Fed. Cir. 2001) (citations omitted). However, the U.S. Supreme Court has suggested that, in certain circumstances when a plaintiff has been deprived of its right to a contractual remedy by the Government, it can bring a Fifth Amendment taking claim for the deprivation of the contractual remedy. In *Lynch v. United States,* 292 U.S. 571, 54 S. Ct. 840, 78 L. Ed. 1434 (1934), a claim against the Government was brought by beneficiaries of contracts for war risk insurance by the Federal Government during World War I, in which the Government was an insurer for persons against death or disability sought payments. During the Great

Depression, Congress passed the Economy Act of 1933 which repealed "all laws granting or pertaining to yearly renewable term insurance." *Id.* at 575. This provision, in effect, breached the insurance contract for which plaintiffs were in privity of contract. A separate statutory provision withdrew the Government's consent to be sued over the policies. *Id.* at 587. The Supreme Court held that because the Government withdrew its consent to be sued, the beneficiaries might have takings claims against the Government because contracts with the Government are a property right within the meaning of the Fifth Amendment, though ultimately the beneficiaries' claims proceeded on due process grounds. *Id.* at 579. Thus the Takings Clause could be implicated in a situation when the Government "repudiates debts to save money." *Buse Timber & Sales, Inc. v. United States,* 45 Fed. Cl. 258, 263 (1999).

The possibility that plaintiffs in *Winstar*-related cases might be able to state a claim for the Government's taking of a contractual remedy has been contemplated by a previous decision in this Court. In *Castle v. United States,* 48 Fed. Cl. 187, 217-220 (2000), a *Winstar*-related plaintiff claimed that the passage of FIRREA effected a taking of its ownership interest in a failed thrift as well as its contractual agreement with the Government. The Court ruled that the passage of FIRREA itself, which deprived the plaintiff of certain accounting treatment, gave rise only to contractual based remedies. However, the Court noted that, in certain circumstances "the Takings Clause would be implicated . . . if the Government had taken away the range of remedies associated with the vindication of a contract." *Id.* at 219.

To be sure, the mere fact that no recovery is yielded by a claimant or that a claimant's contractual claim is extinguished is not in of itself a basis for a taking claim. "The lack of a 'complete' contract remedy . . . because the contract theory does not yield a recovery, [does] not give life to a takings theory." *Home Sav. of America, F.S.B. v. United States,* 51 Fed. Cl. 487, 496 (2002). Nevertheless, there is a distinct possibility that the much-noted conflict of interest vested by Congress in the FDIC – as creditor, deposit insurer, breaching party, and holder of the claims of the breached party – could, in certain *Winstar*-related cases involving failed thrifts, result in the taking of a private plaintiff's range of contractual remedies against the Government. Although this Court may, in the future, be called upon to directly addresses [sic] this issue, it is unnecessary to do so in the case at bar because the contingent nature of the Shareholder Plaintiffs' property interest precludes the finding of any taking.

The starting point for determining whether a taking has occurred is to analyze the nature of the property interest. *Branch v. United States,* 69 F.3d 1571, 1575 (Fed. Cir. 1995); *M & J Coal v. United States,* 47 F.3d 1148, 1154 (Fed. Cir. 1995). The Shareholder Plaintiffs claim that their property interest is the corporation of Security Savings and that Mississippi state law grants them an interest in Security Savings. However, this contention flies in the face of Mississippi state court precedent which holds that "the corporation is a separate entity and the shareholder does not have a legal interest in its property." *Bruno v. Southeastern Servs., Inc.,* 385 So.2d 620, 622 (Miss.1980) (*en banc*). *See also Crocker v. Federal Deposit Ins. Corp.,* 826 F.2d 347, 349 (5th Cir. 1987) ("Mississippi courts have also recognized that injury to shareholders in

the form of a diminution in the value of stock is a loss that is recoverable only by the corporation in a direct action or by the shareholders in a derivative action.") The Mississippi state law of corporations is, in this respect, consonant with this Circuit's precedent which has held, in the context of a contractual claims, that shareholders cannot recover for damages suffered by the corporation. *First Hartford Corp. Pension Plan & Trust v. United States,* 194 F.3d 1279, 1289 (Fed. Cir. 1999). *See also Cain v. United States,* 53 Fed. Cl. 658, No. 95-499C, slip op. at 9-11 (Fed. Cl. July 16, 2002); *FDIC II,* 51 Fed. Cl. at 274-75; 11 *Fletcher Cyclopedia of the Law of Private Corporations* § 5096 at 73 ("The property of a corporation does not belong, in law, to the shareholders, but to the corporation as a distinct legal entity or artificial person."). Instead, the Shareholder Plaintiffs only own shares of the corporation which "are universally considered personal property." *Fayard v. Fayard,* 293 So.2d 421, 423 (Miss.1974). Consequently, the Shareholder Plaintiffs property interest in a takings claim cannot be its interest in Security Savings as a corporate entity.

That leaves the Shareholder Plaintiffs with possession of the property interest that gave them standing to litigate this case, namely their interest "in the surplus of potential recoveries." *FDIC I,* 47 Fed. Cl. at 6 (quoting *Plaintiffs in All Winstar-Related Cases at the Court v. United States,* 44 Fed. Cl. 3, 10 (1999)). However, this interest was zeroed out because this Court ruled that the receivership deficit – an essential element of any theory of damages that could possibly result in a surplus of recoveries – was never a proper portion of Security's damages. *FDIC II,* 51 Fed. Cl. at 270. Even if the FDIC were not saddled with the conflicting roles imposed on it by Congress as described above,

it still could never have recovered for the receivership deficit. Without the receivership deficit, the maximum amount of expectancy damages that could be recovered would be $64 million. *Id.* at 272. Because shareholders of a failed thrift under the longstanding statutory priority scheme are always the last of all claimants to be paid, it would be impossible for the Shareholder Plaintiffs to obtain any surplus recoveries in the face of over $75 million in superior claims against the Security receivership. Thus, in this specific instance, while the remedy did not produce any recovery for the Shareholder Plaintiffs, they were never deprived of their property interest in a contractual remedy. As a result, Defendant did not take any property interest of the Shareholder Plaintiffs.

## VI. Conclusion

Defendant's cross-motion for summary judgment as to takings claims is GRANTED. Shareholder Plaintiffs' motion for partial summary judgment as to its taking claim is DENIED. The Clerk of the Court is directed to enter judgment in favor of the Defendant in Case Nos. 92-577C and 92-817C and to dismiss the complaints of all Plaintiffs. No costs.

EDWARD J. DAMICH

Chief Judge

**FEDERAL DEPOSIT INSURANCE CORPORATION, as Successor in Interest to SECURITY SAVINGS, BAILEY MORTGAGE COMPANY, SECURITY FEDERAL SAVINGS AND LOAN ASSOCIATION; and H.C. BAILEY, JR., et al., Plaintiffs, v. THE UNITED STATES, Defendant.**

**Nos. 92-577 C & 92-817 (consolidated)**

**UNITED STATES COURT OF FEDERAL CLAIMS**

**53 Fed. Cl. 31**

**April 12, 2002, Filed**

**COUNSEL**: Richard M. Schwartz, Washington, DC, counsel of record for Plaintiff. John M. Dorsey, Dorothy A. Doherty, and Richard Gill, of counsel.

Mary C. Gill, Atlanta, GA, counsel of record for Shareholder Plaintiffs. Alan W. Perry, Jackson, MS, of counsel.

William F. Ryan, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, counsel of record for Defendant, with whom were Jeanne E. Davidson, Assistant Director, David M. Cohen, Director; and Stuart E. Schiffer, Deputy Assistant Attorney General. James L. Anderson, Gregory R. Firehock, Daniel D. McClain, Thomas P. Reilly, Patricia A. Smith, of counsel.

**JUDGES**: EDWARD J. DAMICH, Judge.

**OPINION BY**: EDWARD J. DAMICH

**OPINION**: **DAMICH**, Judge.

This case is before the Court on Plaintiff Federal Deposit Insurance Corporation's ("FDIC") motion for partial summary judgment as to takings claims, Defendant's cross-motion for summary judgment as to all

Plaintiffs' takings claims, and Plaintiff FDIC's due process claim.

This is a long-standing *Winstar*-related case. Plaintiff FDIC, as successor-in-interest to Security Savings & Loan Association of Jackson, Mississippi ("Security Savings"), seeks compensation for the elimination of Defendant's contractual promises by the Federal Savings and Loan Insurance Corporation ("FSLIC") to Security Savings that permitted it to count supervisory goodwill and other items including FSLIC cash contributions and income capital certificates towards its regulatory capital requirements. These contractual obligations were eliminated by the passage of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub.L. 101-73, 103 Stat. 183, and its implementing regulations. Plaintiff FDIC alleges that the elimination of these contractual obligations resulted in a taking of a property right and it is therefore entitled to just compensation pursuant to the Fifth Amendment of the U.S. Constitution. These contracts are discussed in further detail in the Court's opinion in *F.D.I.C v. United States,* 47 Fed. Cl. 2, 4-5 (2000).

On December 21, 2001, the Court issued an opinion which held, following the Federal Circuit's decisions in *Landmark Land Company v. United States,* 256 F.3d 1365 (Fed. Cir. 2001) and *Glass v. United States,* 258 F.3d 1349 (Fed. Cir. 2001), that Plaintiff FDIC did not possess standing under Article III of the United States Constitution because its contract claims did not present a "Case" or "Controversy." *F.D.I.C. v. United States,* 51 Fed. Cl. 265, 272 (2001). The basis for this holding was that Plaintiff FDIC, as manager of the FSLIC Resolution Fund ("FRF"), through a series of transactions and by operation of statute, serves as both payer of any judgment in this case

and creditor of Security. Because any damages that Plaintiff FDIC might receive would only be used by the FRF to pay the subrogated claim of the FRF and no one else, no adverse relationship existed between it and any third party. *See id.* at 266-69 (describing the chain of ownership of the goodwill claims, the components of the subrogated claim of the FRF, and the distribution scheme of damages.)

Additionally, in that decision, the Court also held that Plaintiff FDIC's claim for the "receivership deficit" of Security, i.e., the shortfall that occurred after the Resolution Trust Corporation made deposit insurance payments for the benefit of the former depositors of Security, presented a non-justiciable intra-governmental dispute because it was a claim of the Government and not a claim of the Thrift. *Id.* at 269-70.

Finally, the Court also held that Plaintiff FDIC could not establish a case or controversy for its contract claims by means of a controversy between it and other Plaintiffs in this case. *Id.* at 276-77.

Plaintiff FDIC is entitled to raise its disagreement with the above-enumerated holdings of the Court, if for no other reason than it will not be precluded from making similar arguments on appeal. Nevertheless, Plaintiff FDIC fails to make any meaningful distinction between its standing with respect to its takings claims as opposed to its contract claims. Therefore, the holdings of this decision are equally applicable to Plaintiff FDIC's takings claims as they are to its contract claims.

Applying the holdings described above to Plaintiff FDIC's takings claims, it is clear that Plaintiff FDIC does not have standing to pursue them in this Court. Excluding the receivership deficit to which it is not entitled, Plaintiff

FDIC at most can recover $19.6 million including interest. Pl. FDIC's Mot. at 26. If the 1-year constant maturity Treasury yield for the years 1990 through 1991 were applied to the $19.6 million figure and the interest were compounded, the amount of compensation would total approximately $36.4 million. Def.'s Mot. at App. 122. This amount is far less than the subrogated claim of the FRF, which totals in excess of $66 million. *F.D.I.C.*, 51 Fed. Cl. at 268. Because any damages awarded to Plaintiff FDIC would exceed the subrogated claim of the FRF, no case or controversy exists between Plaintiff FDIC and Defendant. Accordingly, Plaintiff FDIC lacks Article III standing to pursue this case.

Because Plaintiff FDIC does not contest dismissal of its due process claim and also because it lacks standing to pursue its takings claims, Defendant's cross-motion for summary judgment, with respect to the takings claim and the due process claim of Plaintiff FDIC, is GRANTED and Plaintiff FDIC's motion for partial summary judgment as to its takings claims is DENIED. Plaintiff FDIC is hereby dismissed from the consolidated proceedings. Final judgment shall not be entered until the remainder of Defendant's cross-motion for summary judgment and the Shareholder Plaintiffs' motion for partial summary judgment as to takings are resolved.

EDWARD J. DAMICH

Judge

**FEDERAL DEPOSIT ISURANCE CORPORATION, as Successor in Interest to SECURITY SAVINGS, BAILEY MORTGAGE COMPANY, SECURITY FEDERAL SAVINGS AND LOAN ASSOCIATION; and H.C. BAILEY, JR., et al., Plaintiffs, v. THE UNITED STATES, Defendant.**

**Nos. 92-577 C & 92-817 C (consolidated)**

**UNITED STATES COURT OF FEDERAL CLAIMS**

**51 Fed. Cl. 265**

**December 21, 2001, Filed**

**COUNSEL:** Richard M. Schwartz, Washington, DC, counsel of record for Plaintiff. John M. Dorsey, Dorothy A. Doherty, and Richard Gill, of counsel.

Mary C. Gill, Atlanta, GA, counsel of record for Shareholder Plaintiffs. Alan W. Perry, Jackson, MS, of counsel.

William F. Ryan, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, counsel of record for Defendant, with whom were Jeanne E. Davidson, Assistant Director; David M. Cohen, Director; and Stuart F. Schiffer, Deputy Assistant Attorney General. James L. Anderson, Gregory R. Firehock, Daniel D. McClain, Thomas P. Reilly, Patricia A. Smith, of counsel.

**JUDGES:** EDWARD J. DAMICH, Judge.

**OINION BY:** EDWARD J. DAMICH

**OPINION: DAMICH**, Judge.

Presently before the Court are the Defendant's motion for summary judgment as to damages, the Shareholder Plaintiffs' motion for bifurcation, and briefings on the standing of the FDIC to pursue its damages claims as

directed by the Court's Order to Show Cause. For the reasons enumerated below, the Defendant's motion for summary judgment is GRANTED in part, and the Plaintiff's motion for bifurcation is DENIED. All goodwill claims that were not disposed of in the Defendant's motion for summary judgment are dismissed due to the absence of a case or controversy between the Federal Deposit Insurance Corporation ("FDIC") and the United States. Consequently, the Shareholder Plaintiffs' contingent goodwill claims are extinguished.

## I. Background

This is a long-standing *Winstar*-related case. The Plaintiffs are the FDIC, as successor-in-interest to the failed Security Savings and Loan Association of Jackson, Mississippi ("Security Savings") and, appearing separately, the shareholders of Security Savings ("Shareholder Plaintiffs").[1] The Plaintiffs seek damages for losses incurred by Security Savings when the Federal Savings and Loan Insurance Corporation ("FSLIC") breached contracts that permitted Security Savings to count supervisory goodwill and certain other items, including FSLIC cash contributions and income capital certificates ("ICC's"), in computing its regulatory capital requirements ("goodwill claims"). These contractual commitments were breached by the passage of the Financial Institutions Reform, Recovery,

[1] The Shareholder Plaintiffs, who collectively own all of the outstanding stock of Security, are H.C. Bailey, Jr.; Joan B. Bailey; Harperville Irrevocable Trust; Carol Bailey; Malco Irrevocable Trust; John T. Cossar; Glynn Hughes; Lewis S. Tilghman; Kenneth W. Warren; and Madison Hills Farm, Inc.

and Enforcement Act of 1989 ("FIRREA"), Pub. L. 101-73, 103 Stat. 183, and its implementing regulations. These contracts are discussed in further detail in the Court's opinion in *FDIC v. United States,* 47 Fed. Cl. 2, 4-5 (2000). Although Security Savings itself originally pursued its claims in what is now the U.S. Court of Federal Claims, the Resolution Trust Corporation ("RTC"), in its capacity as receiver for Security Savings, was substituted as Plaintiff for Security Savings after Security Savings was seized by the Office of Thrift Supervision ("OTS") and the RTC was appointed as Security Savings' conservator.[2] The resulting transfer of the ownership of the goodwill claims and takings claims from Security Savings to the FDIC is described in detail in the next section. The Shareholder Plaintiffs possess their own takings claim independent of the takings claim of Security Savings.

## II. Ownership of Security Savings' Goodwill Claims

The FDIC, as manager of the FSLIC Resolution Fund ("FRF"), came into control of the ownership of Security Savings' goodwill claims through a complicated series of transactions. These transactions have some bearing on the issue of whether the FDIC can recover for the "receivership deficit" of Security Savings and, ultimately, whether a case or controversy exists between the United States and the FDIC. Therefore, these transactions will be discussed

[2] Subsequent to the substitution of the RTC as Plaintiff, the Shareholder Plaintiffs filed *H.C. Bailey v. United States,* 47 Fed. Cl. 2, which consisted of the same allegations as the original *Security Savings* action. These two cases were consolidated under Case No. 577C in 1997.

in some detail. First, OTS seized the assets of Security Savings on October 16, 1992, and appointed the RTC as receiver for Security Savings in what is known as a "pass-through receivership." Def.'s Resp. to the Court's Order To Show Cause (*hereinafter* "Def.'s Br.") at App. 111-14. As receiver, the RTC succeeded to all of Security Savings assets, including any goodwill claim that Security possessed. 12 U.S.C. §§ 1441a(b)(4)(A), 1821(d)(2)(A)(i) (1994). Simultaneously, the OTS issued a charter for a new institution called Security Federal Savings and Loan Association ("Security Federal"), for which the RTC was appointed as conservator. Def.'s Br. at App. 111-14. All of the assets and most of the liabilities of Security Savings were transferred from the Security Savings receivership, operated by the RTC, to Security Federal by means of a purchase and assumption agreement. Def.'s Br. at App. 115-44. In consideration for this transaction, Security Federal promised to pay the Security Savings pass-through receivership any funds that remained after all of Security Federal's liabilities were paid. Def.'s Br. at App. 125-26. As a result, the shareholders of the old Security Savings, now the Shareholder Plaintiffs in this action, possessed a contingent interest in funds contained in the Security Savings pass-through receivership.

The RTC operated Security Federal in conservatorship until April 15, 1994, when a series of events took place simultaneously that, in effect, ended the operation of Security Federal. First, OTS appointed the RTC as receiver for Security Federal. Def.'s Br. at App. 23-25. As receiver, the RTC succeeded to all of the assets of Security Federal, including the goodwill claims. 12 U.S.C. §§ 1441a(b)(4)(A), 1821(d)(2)(A)(i). Second, the RTC sold certain assets of Security Federal, including the goodwill

claims, to the RTC acting in its corporate capacity. Def.'s Br. at App. 24-30, 153-54. In the contract of sale, RTC-Corporate promised that, if it realized any money on the assets it purchased, including the goodwill claims, it would first pay the expenses that it incurred in liquidating the assets, plus interest. Def.'s Br. at App. 154 (Contract of Sale § 2.3). Any excess monies would be refunded to the Security Federal receivership for distribution in accordance with the statutory priority scheme set forth in 12 U.S.C. § 1821(d)(11). Def.'s Br. at App. 150-54 (Contract of sale §§ 1.1, 2.3).

At the same time, the RTC, as receiver for Security Federal, sold certain assets of Security Federal, as well as all of Security Federal's deposit liabilities, to several financial institutions. Def.'s Br. at App. 145. Because the assets that were sold to them were worth less than the deposit liabilities assumed by the acquiring financial institutions, RTC-Corporate provided them with approximately $84.3 million in additional funds. Def.'s Br. at App. 146. That amount represents RTC-Corporate's original subrogated claim against the Security Federal receivership. Due to continued liquidation of assets of Security Federal, the subrogated claim was reduced over time. That subrogated claim was reduced to $42.6 million but with interest stands in excess of $64.1 million as of year-end 2000. Def.'s Br. at App. 163. However, this receivership deficit now grows over time as it accrues interest. As of October 31, 2001, the subrogated claim of the FRF is now in the amount of $66,389,996. Pl. FDIC's December 11, 2001 Status Report at 2.

The RTC was terminated by operation of law on December 31, 1995, and all assets and liabilities held by RTC-Corporate, including the goodwill claim and the

RTC's subrogated claim against the Security Federal receivership, were transferred to the FRF. 12 U.S.C. § 1441a(m)(1)-(2). This portion of the FRF is known as FRF-RTC. The FRF-RTC is managed by the FDIC acting in its corporate capacity. 12 U.S.C. §§ 1811, 1821a(a)(1). Separately, the FDIC, acting in its capacity as receiver, succeeded to the RTC, acting in its capacity as receiver. 12 U.S.C. § 1441a(m)(1).

## III. Distribution Scheme of Damages

Assuming that this Court were to award damages in this case, the FDIC, as manager of the FRF-RTC, would, following the chain of transactions outlined in the previous section, distribute recovery in the following order. First, pursuant to the contract of sale by which the RTC acquired Security Savings' goodwill claim, the FDIC would pay the FRF-RTC the expenses it incurred in pursuing the goodwill claim, any advances the FRF-RTC made to Security Federal, and interest on both. Second, the FDIC would then use any excess monies to satisfy FRF-RTC's subrogated claim against the Security Federal receivership. 12 U.S.C. § 1821(d)(11) ("Any deposit liability of the institution" [has priority over] "any other general or senior liability of the institution.") *See also Glass v. United States,* 258 F.3d 1349, 1355-56 (Fed. Cir. 2001), *as amended on reh'g, Glass v. United States,* 273 F.3d 1072 (Fed. Cir. 2001) ("While any net recovery by the FDIC would be distributed to creditors under the statutory scheme applicable to the . . . receivership, in this case, FRF-RTC has priority over all of the creditors under this statutory scheme."); *Landmark Land Company v. United States,* 256 F.3d 1365, 1381 (Fed. Cir. 2001). Third, if any funds remained, it would distribute the funds to other

outstanding creditors of the Security Federal receivership, pursuant to the statutory scheme in 12 U.S.C. § 1821(d)(11). Fourth, if any funds remained after all outstanding creditors of the Security Federal receivership have been satisfied, those funds would be distributed to any remaining creditors of Security Savings through the pass-through receivership of Security Savings. As shareholders of Security Savings, the Shareholder Plaintiffs would be the last creditors to be paid by the pass-through receivership of Security Savings. 12 U.S.C. § 1821(d)(11)(A)(v).

## IV. The FRF as Payer of Judgments and as Creditor

The FRF, of which the FDIC is the manager, serves as both creditor of Security Federal and payer of any judgment in this case. The dual roles of the FRF are significant as to whether the FDIC can recover for the FRF's subrogated claim and the receivership deficit of Security. The FSLIC, as stated above, was the party that breached the contractual obligations at issue in this case. However, with the enactment of FIRREA, the FSLIC was abolished, and all of its assets and liabilities were transferred to its successor, the FRF. 12 U.S.C. § 1821a(a)(1), (a)(2)(A). The assets and liabilities of the former FSLIC are accounted for in a fund within the FRF separate from FRF-RTC. This separate fund is called FRF-FSLIC. Thus, FRF-FSLIC would pay the judgment of any recovery that the Court might grant in this case because it is the successor of the breaching party. *Landmark,* 256 F.3d at 1381; *Glass,* 258 F.3d at 1355. At the same time, FRF-RTC is the largest creditor of the Security receivership, with a subrogated claim of approximately $66.4 million. The only creditors with plausible claims against the Security Federal receivership are third-party creditors. Def.'s Br. at 163. Because

there are no uninsured depositor claims against the Security Federal receivership, in effect, FRF-RTC has priority, in this case, over all other creditors under the current national depositor preference statute.[3]

Finally, if the FRF is unable to recover on any deficit, the Secretary of the Treasury is required to provide the FRF with sufficient funds to satisfy any liabilities. 12 U.S.C. § 1821a(c)(1). Upon dissolution of the FRF, any remaining surplus of funds shall be paid into the Treasury. 12 U.S.C. § 1821a(f).

## V. Standard for Summary Judgment

Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. RCFC 56(c); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247, 106 S. Ct. 2505, 2509-10, 91 L. Ed. 2d 202 (1986); *Jay v. Secretary, DHHS,* 998 F.2d 979 (Fed. Cir. 1993). The party moving for summary judgment bears the initial burden of demonstrating the absence of any genuine issues of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 325, 106 S. Ct. 2548, 2553-54, 91 L. Ed. 2d 265 (1986). The court must resolve any doubts about factual issues in favor of the non-moving party, *Chiuminatta Concrete Concepts, Inc. v. Cardinal Indus., Inc.,* 145 F.3d 1303, 1307 (Fed. Cir. 1998), and draw all reasonable inferences in its favor. *See*

[3] The current national depositor preference statute that Congress enacted in 1993 in the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 3001(c), 107 Stat. 312, 337 (August 10, 1993) (codified at 12 U.S.C. § 1821(d)), applies to the Security Federal receivership because it was instituted on April 15, 1994.

*Gasser Chair Co. v. Infanti Chair Mfg. Corp.*, 60 F.3d 770, 773 (Fed. Cir. 1995)

## VI. The FDIC Cannot Recover Under Any Of Its Theories Of Damages.

The FDIC has presented five theories of recovery in this case. First, the FDIC seeks expectancy damages in the amount of $208.6 million, which it believes to represent the "lost value" of Security Savings as of year-end 1998. Def.'s Br. at App. 78-79, 92-94, 97-99. This amount is equal to the difference between the receivership deficit of Security Federal as of year-end 1998 ($68.2 million) and the market value of the assets of Security Savings that, but for the breach, the FDIC maintains that Security Savings would have had as a result of its de-banking strategy as of year-end 1998 ($140.4 million).[4] Second, in the alternative to year-end 1998, the FDIC seeks expectancy damages in the amount of $64.0 million, representing what it argues is the "lost value" of Security Savings as of year-end 1994. Def.'s Br. at App. 78-80, 92-96, 100-02. This amount represents the market value of what the FDIC maintains that, but for the breach, Security Savings would have had as of year-end 1994 pursuant to its de-banking strategy

[4] The de-banking strategy refers to the Plaintiffs' postulation that, but for the breach, Security Savings would have exited the thrift business in 1994 and pursued other commercial interests. *See generally infra*, § VI(A)(2) on the de-banking strategy. The FDIC seeks expectancy damages for the lost value of Security calculated up until the time of the satisfaction of the judgment. However, because the expert report in this case was submitted to the Government on February 9, 1999, the expectancy damages sought have only been calculated up until year-end 1998.

($15.0 million) and the deficit of the Security receivership at year-end 1994 ($49.1 million). Year-end 1994 represents the date that, according to the FDIC's theory, Security Savings would have exited the thrift business in the absence of the breach. Third, in the alternative, the FDIC seeks a restitution claim in the amount of $5.5 million for the asserted value that Security Savings contributed to the transactions at issue in this case. Def.'s Br. at App. 77-78, 90-92. Fourth, in the alternative, the FDIC seeks $7.2 million for the cost of replacing Security Savings' goodwill at the time of the transactions at issue here. Def.'s Br. at App. 75-76, 83-90. The fifth and final theory of recovery for the FDIC is for the cost of replacing Security Savings' goodwill at the time of the breach, in the amount of $5.4 million. Def.'s Br. at App. 76, 83-90.

### A. The FDIC's "Lost-value" Claim as of Year-end 1998

The FDIC's "lost-value" claim as of year-end 1998 consists of the difference between the receivership deficit of Security Federal as of year-end 1998 ($68.2 million) and the proposed value that Security Savings would have had at year-end 1998 ($140.4 million). This value is predicated on a theory, called the de-banking strategy, that, in the absence of the breach, Security Savings would have exited the thrift business by 1994 and pursued other commercial interests. The total damages claim is $208.6 million.

#### 1. The FDIC Cannot Recover for the Receivership Deficit of Security Federal.

The receivership deficit consists of the shortfall that occurred after Security Federal's assets were liquidated

and after the RTC made deposit insurance payments for the benefit of the former depositors of Security Federal. The deficit also includes interest and tax liability. However, the largest component of the receivership deficit is the subrogated claim of the FRF-RTC in the amount of $42.6 million plus interest, for a total of $64.1 million as of year-end 2000. As of October 31, 2001, the total subrogated claim is in excess of $66 million. The FDIC argues that the receivership deficit is a component of a "unitary" expectancy damages claim of Security comprising of (a) the cost of the receivership deficit that would have been avoided had the contractual obligations of the Government not been breached and (b) the amount that Security Savings would have earned until 1994 (and beyond) when Security Savings would supposedly have "de-banked." *See generally infra,* § VI(A)(2) regarding the de-banking claim. However, the Defendant argues, convincingly, that the FDIC cannot recover for the receivership deficit of Security Federal because the receivership deficit is not a claim of Security Federal as such, but is instead a claim of the Government (the FDIC), and also because the dispute over the receivership deficit is a non-justiciable intra-governmental controversy.

First, the FDIC cannot pursue the receivership deficit claim in this case because the Federal Circuit in *Landmark* and *Glass* clearly stated that the subrogated claim of the FRF is a "claim of the Government." *Landmark,* 256 F.3d at 1381; *see also Glass,* 258 F.3d at 1355. The holding of the Federal Circuit is directly applicable to this case because the subrogated claim of the FRF cannot be, properly speaking, a claim of Security Federal, but remains, as it was prior to its liquidation, an obligation of Security Federal to its depositors, which it now owes to the

FRF as subrogee. *See Castle v. United States,* 48 Fed. Cl. 187, 198 (2000); *Hansen Bancorp. Inc.,* 49 Fed. Cl. 168, 176 n.12. This subrogated claim represents the loss absorbed, not by Security Federal, but by the RTC when it paid off the depositors of Security Federal. The receivership deficit claim, therefore, was never owned by Security Federal, but only owned by the RTC as subrogee and now transferred to the FRF as the successor to the RTC. Furthermore, the subrogated claim represents liabilities of Security Federal that cannot now, through a breach of contract claim, be converted into an asset of Security Federal. The FDIC, as successor-in-interest to Security Federal, can only recover damages suffered by Security Federal and not damages suffered by the deposit insurer such as the receivership deficit. *See Statesman Sav. Holding Corp. v. United States,* 41 Fed. Cl. 1, 12 (1998) ("Because any damage suffered as a result of the receivership deficit has been suffered by the FRF, not [the thrift], this element of plaintiff FDIC's claim must be dismissed.")

A second reason why the FDIC cannot pursue the receivership deficit claim follows from the FRF's position as both payer of judgments and as creditor in this action. Any judgment in this case, including the receivership deficit – if such sums were to be recovered – would be paid by FRF-FSLIC into the FRF-RTC fund. The result would be a transfer of funds from one portion of the FRF's accounting ledger to another. Because the FDIC, a government agency, is paying itself, the receivership deficit claim is a non-justiciable intra-governmental controversy. Moreover, the Treasury is required by statute to satisfy any unfunded liability of the FRF and is likewise the recipient of any surplus from the FRF upon its dissolution.

*See* 12 U.S.C. §§ 1821a(c), 1821a(f). As articulated in *Statesman:*

> If the receivership deficit claim were allowed, the result would be a federal agency, FDIC-corporate, litigating against the United States Department of Justice with the goal of causing a large portion of any damages recovered to be transferred from one Treasury account to another. Such a result would be nonsensical in that the United States Treasury has already provided the FRF with the funds used to make depositors of failed thrifts whole, is required to fund any FRF deficit, and will be the beneficiary of any FRF surplus.

*Statesman,* 41 Fed. Cl. at 13.

Therefore, there is no possibility that the failure of the FDIC to recover the receivership deficit would result in an increase of the liability of the government. Accordingly, because the receivership deficit claim is, ultimately, a non-justiciable intra-governmental dispute, the FDIC cannot recover damages for it. *See also Castle,* 48 Fed. Cl. at 199.

### 2. The FDIC Cannot Recover Expectancy Damages Under a De-Banking Strategy After 1994.

The FDIC seeks a lost-profits theory of expectancy damages predicated upon what it calls a "de-banking" plan as described by the Shareholder Plaintiffs' experts, Nevins Baxter and Paul Salvo. The FDIC claims that, even if the Government had not breached its contractual obligations to Security Savings, the non-breach provisions of FIRREA would have prevented Security Savings from simultaneously participating in the thrift business and engaging in direct investment in real estate and other equity investments such

as financial institutions. Faced with a choice between these two lines of business, Security Savings would have chosen to continue managing its real estate and other equity holdings and to exit the thrift business by means of a "de-banking" strategy. The de-banking strategy would have consisted of several steps. First, Security Savings would have sold its mortgage banking and servicing operation in 1990. Def.'s Br. at App. 54-55. It would have re-purchased ICC's held by the FRF. Def.'s Br. at App. 61. It would have then relinquished its thrift charter and sold its retail banking franchise (including its deposits and branch offices) in 1994. Def.'s Br. at App. 55-57. It would have then held on to its remaining assets and changed the name of the corporation to the hypothetically named "SS Inc." SS Inc. would then serve as an investment holding company for direct investments in financial institutions and real estate that would appreciate over time. SS Inc. would also have collected or disposed of remaining commercial loans and retained foreclosed real estate properties. Def.'s Br. at App. 57-64. The expectancy damages sought by the FDIC would include the net proceeds raised from the de-banking strategy described above and the wounded-bank damages[5] avoided by Security Savings, all of which Security Savings would have accrued but for the breach. Def.'s Br. at App. 52. As of year-end 1998, the estimated amount of damages would be approximately

[5] "'Wounded bank' damages have been defined as costs resulting from a bank's 'perilous financial condition' created by a breach of contract." *Coast Federal Bank, F.S.B. v. United States,* 48 Fed. Cl. 402, 434 (2000) (citing *California Federal Bank v. United States,* 43 Fed. Cl. 445, 448 (1999), *rev'd on other grounds,* 245 F.3d 1342 (Fed. Cir. 2001)).

$140.4 million, though that amount would likely be higher if calculated today. Def.'s Br. at App. 71.

Assuming for the sake of argument that this Court were to accept the FDIC's proposed de-banking strategy, the FDIC could not possibly recover damages for any damages suffered by Security Savings beyond 1994. Under the FDIC's own strategy, the successor entity of Security Savings would not operate as a thrift after 1994. While it is certainly true that successor corporations can own goodwill claims – such as when California Federal Savings Bank acquired Glendale Federal Bank and its goodwill claims, *Glendale Federal Bank, FSB v. United States,* 239 F.3d 1374, 1378 (Fed. Cir. 2001) – SS Inc. is neither a bank nor a thrift and has no use for supervisory goodwill. Had Security Savings, but for the breach, de-banked, the benefits of the contractual obligation of the Government to count goodwill towards regulatory capital would not flow to SS Inc., but would instead flow to the purchaser of the thrift's business. The FDIC can, as the successor-in-interest and as receiver to Security Savings, possess the contractual claims of what Security Savings could have possessed but for the breach. 12 U.S.C. §§ 1441a(b)(4)(A); 1821(d)(2)(A)(i); *O'Melveny & Myers v. F.D.I.C.,* 512 U.S. 79, 86, 129 L. Ed. 2d 67, 114 S. Ct. 2048 (1994) (as receiver, the RTC and FDIC "step[ ] into the shoes" of a failed thrift). However, the FDIC possesses no greater authority than Security Savings had it survived. *Waterview Mgmt. Co. v. F.D.I.C.,* 323 U.S. App. D.C. 82, 105 F.3d 696, 701 (D.C. Cir. 1997); *Statesman,* 41 Fed. Cl. at 11. Therefore, in the non-breach world, SS Inc. could not possibly have retained the benefits of the contract. Assuming that the FDIC can recover lost profits deriving from a

de-banking strategy constructed *post hoc,* it can only do so no later than year-end 1994.[6]

### B. The Remaining Damage Theories Do Not Present a Case or Controversy Between the FDIC and the Federal Government.

Article III, § 2 of the U.S. Constitution restricts federal courts from deciding any issue other than "Cases" or "Controversies." *Arizonans for Official English v. Ariz.,* 520 U.S. 43, 64, 137 L. Ed. 2d 170, 117 S. Ct. 1055 (1997). Incorporated within the case or controversy requirement is the standing of a party to sue. *Id.* In order for a party to have standing, there must be a true adverse relationship between the parties. *Aetna Life Ins. v. Haworth,* 300 U.S. 227, 240, 81 L. Ed. 617, 57 S. Ct. 461 (1937). In this case, the FDIC cannot establish an adverse relationship between itself and the Government because, assuming that the FDIC obtained a judgment on any of its remaining damages theories, none of the money paid by FRF-FSLIC would ever be received by anyone other than FRF-RTC. *Landmark,* 256 F.3d at 1382; *Glass,* 258 F.3d at 1355-56. As stated above, the subrogated claim of the FRF-RTC in this case against Security Federal is in excess of $66 million dollars. The subrogated claim of the FRF-RTC against Security Savings exceeds the $64 million that

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[6] The Defendant also argues that, as a matter of law, the FDIC's expectancy damage claim, and its de-banking strategy in particular, is unforeseeable and that there is a lack of causation between it and the breach. However, as will be explained in the following section, the amount sought for the expectancy damage claim as of year-end 1994 is insufficient to establish a case or controversy with respect to the FDIC's contract claims. Therefore, the Court will not address these issues.

remains from the FDIC's expectancy damage claim as of year-end 1994, excluding the receivership deficit component which is unrecoverable for the reasons stated above. The subrogated claim of the FRF-RTC far exceeds the FDIC's theories of recovery valued by a restitution theory or valued by the cost of replacement of goodwill at either the time of the transactions at issue in this case or at the time of the breach. The damages that could be recovered from these theories are $5.5 million, $7.2 million, and $5.4 million respectively. Because there are no other creditors in this case, such as uninsured depositors, that could have the same priority as the FRF, all proceeds from the judgment would be used by the FRF to pay itself.

Furthermore, as stated above, the U.S. Treasury is required by statute to fund any deficit remaining in the FRF and is the beneficiary of any surplus of the FRF at its dissolution. Because the FRF is fully funded, recovery by the FRF does not affect third-party creditors with claims against the FRF. *Landmark,* 256 F.3d at 1381. Therefore, when faced with the situation outlined in *Landmark* and *Glass* where there are no third-party creditors that could recover damages or are otherwise on a par with the FRF-RTC, the FDIC cannot recover the claims of the FRF-RTC because such claims do not present a case or controversy.[7]

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[7] Importantly, the FDIC concedes that no third-party creditor or stockholder would have any recovery in this specific case:

> Were this court to hold, in our view erroneously, that the FDIC's recovery on its lost profits/lost equity value claim as of 1994 was limited to recovery of an amount equal to the positive equity value Security Savings should have had in 1994 absent the breach, under the facts of this particular case, the evidence currently indicates that any such

(Continued on following page)

There is, however, one difference between the claims in this case and the claims in *Glass* and *Landmark,* and that is the nature of the claims of the Shareholder Plaintiffs. In *Landmark,* the FDIC was an intervening party whose claims were independent of that of the original plaintiff, Landmark, which was also permitted to remain in the case as a co-plaintiff. *Landmark,* 256 F.3d at 1382. In *Glass,* the shareholder plaintiffs were "at most incidental beneficiaries of the contract with no rights to enforce the contract against the United States." *Glass,* 258 F.3d at 1355. In the present case, the FDIC is the successor to the thrift and the Shareholder Plaintiffs intervened in this case to sue "derivatively on behalf of the shareholders, and maintain their claim . . . in the manner that Judge Turner termed it: 'a direct, vested interest in the surplus of potential recoveries.'" *F.D.I.C.,* 47 Fed. Cl. at 6. The claims at issue in *Glass* or *Landmark,* unlike the present case, did not involve derivative claims.

Notwithstanding these differences, the holding of *Glass* and *Landmark* is directly applicable to the present case. "Critical to the issue of standing, then, is the fact that adjudication of the FDIC's claim cannot affect any party other than the government." *Landmark,* 256 F.3d at 1381. If, for the sake of argument, the FDIC were to adjudicate the remaining claims, the monies paid by FRF-FSLIC would be used to partially satisfy the subrogated claim of FRF-RTC. Because there would be no monies left over, the Shareholder Plaintiffs could not receive any

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recovery would not result in recovery by any third party creditor or stockholder.

Pl FDIC's Response to Proposed Stipulation 4.

recovery insofar as they only have an interest in the "surplus of potential recoveries." *F.D.I.C.*, 47 Fed. Cl. at 6. The Shareholder Plaintiffs are, therefore, no worse off if the FDIC's contract claims are dismissed than they would be if the FDIC adjudicated its claims: in both cases the amount of surplus recovery is zero. Logically, therefore, the FDIC's goodwill claims should be dismissed for lack of a case or controversy. Likewise the Shareholder Plaintiffs contingent goodwill claims also should be dismissed because, as there is no possibility of any surplus recoveries that they can receive, their claims are extinguished.

## VII. The Goodwill Claims Of The Shareholder Plaintiffs And The FDIC Cannot Be Bifurcated.

To prevent dismissal of all goodwill claims the Shareholder Plaintiffs have filed a motion to bifurcate the contract claims of the FDIC and the shareholders.[8] They maintain that the claims must be bifurcated because the FDIC, due to what Judge Miller aptly described as its "hydraheaded"[9] role in *Winstar*-related proceedings because it is the successor-in-interest to both the breaching party and the original plaintiff, has been effectively precluded from pursuing the contract claims of Security Savings. In particular, the Shareholder Plaintiffs maintain that the duties imposed by statute upon the FDIC present insuperable conflicts of interest. These roles include its

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[8] This motion to bifurcate was filed in response to the Defendant's motion for summary judgment based upon the FDIC's inconsistent statements which, if the Court had granted, would have dismissed the contract claims of both the FDIC and the shareholders.

[9] *Statesman*, 41 Fed. Cl. at 13 n.17.

duty as receiver of Security Savings, 12 U.S.C. § 1441a(m)(1); as owner of the claims of Security Federal as manager of FRF-RTC, 12 U.S.C. § 1441a(m)(2); and as successor to the obligations of the breaching party FSLIC in its role as manager of FRF-FSLIC, 12 U.S.C. § 1821a(a)(1). Moreover, the Shareholder Plaintiffs argue that they could be precluded by statute from challenging any amount that the FDIC will pay itself as manager of the FRF-RTC or otherwise challenging the FDIC's application of the priority scheme. 12 U.S.C. § 1821(d)(13)(D) (bars judicial review of any "claim or action for payment from" or "action seeking a determination of rights with respect to" any "asset" of a failed bank). *But see* 12 U.S.C. § 1821(d)(6) (providing administrative review "with respect to any claim against a depository institution for which [the FDIC] is receiver" in the district court where the failed bank had its principal place of business or the U.S. District Court for the District of Columbia); *Freeman v. F.D.I.C.,* 312 U.S. App. D.C. 324, 56 F.3d 1394, 1400 (D.C. Cir. 1995). They maintain that, because of the failure of the FDIC to effectively pursue the goodwill claims of Security Savings, bifurcating their derivative claim from the contract claim of the FDIC provides them with the right to recover "surplus" from Security's expectancy damage claim directly from the Government. As justification for this motion, they cite the Federal Circuit's decisions in *Branch v. United States,* 69 F.3d 1571 (Fed. Cir. 1995), and *California Housing Securities, Inc. v. United States,* 959 F.2d 955 (Fed. Cir. 1992), as well as Judge Turner's non-binding opinion in *Plaintiffs in All Winstar-Related Cases v. United States,* 44 Fed. Cl. 3 (1999) as holding that their rights as shareholders are "independent of, and equal to, those of the FDIC." Pl.'s Mot. to Bifurcate at 17.

In response to this Court's Order to Show Cause, however, the Shareholder Plaintiffs have seemingly backed away to a degree from their implied assertion that they can appropriate the goodwill claims of Security for themselves. Instead, they request the Court to stay the FDIC's goodwill claims, and permit the shareholders to litigate Security Savings' contract claim derivatively and the shareholders' own takings claim. The Shareholder Plaintiffs propose that if any damages are recovered, the FDIC could not recover the portion of the damages that belongs to it, but that the "surplus" of such damages could be recovered by the shareholders. However sympathetic the Court is to the frustrations of the Shareholder Plaintiffs that they may recover nothing as a consequence, perhaps in part, of the seemingly conflicting roles that Congress mandated the FDIC to perform even though they initiated this case and pursued their goodwill claims for many years, their unique proposal to bifurcate the claims of the plaintiffs is in itself impossible and could not, in any event, salvage the goodwill claims in this case even if their motion were to be granted.

First, a motion to bifurcate is a procedural device to promote the smooth administration of claims. *Bull HN Information Sys. Inc. v. Hutson,* 229 F.3d 321, 329 (1st Cir. 2000). The Shareholder Plaintiffs cannot show that a procedural device can create substantive rights that otherwise would not exist. The Shareholder Plaintiffs certainly cannot, through bifurcation of the goodwill claims, directly obtain a judgment in this case for themselves from the Government, under the guise of a derivative action, for damages in the place of the FDIC when the FDIC is the proper owner of the goodwill claims of Security Savings.

> The procedural device of derivative actions does not broaden the scope of the waiver of sovereign immunity. Rather, in circumstances in which those in control of the management of the corporation are unable or unwilling to bring suit, it permits shareholders to step into the shoes of the corporation and file suit as fiduciaries on the corporation's behalf and for the corporation's benefit.

*First Hartford Corp. Pension Plan & Trust v. U.S.*, 194 F.3d 1279, 1293 (Fed. Cir. 1999). Functionally, this means that shareholders of a failed thrift cannot assert a direct claim against the United States. "One of the principal motivations behind utilizing the corporate form is often the desire to limit the risk of ownership to the amount of capital invested and thus avoid the obligations, contractual or otherwise, of the corporation. Consequently . . . shareholders may not bring breach of contract claims on their own behalf in the Court of Federal Claims." *First Hartford,* 194 F.3d at 1289.

In his opinion finding a breach of contract in this case, former Chief Judge Smith did not address the issue of whether the Shareholder Plaintiffs could recover directly from the Government or whether all damages should be channeled through the receivership. *F.D.I.C. v. United States,* 47 Fed. Cl. at 6 n.6. However, this question, along with the issue of whether the goodwill claims of Security as such may be litigated by the Shareholder Plaintiffs, has been effectively addressed by *First Hartford.* The Federal Circuit permitted shareholders to sue derivatively for a surplus in any recovery precisely because the shareholders must receive their share of any judgment through the receivership and not directly from the Government itself.

> The same principle applied in *California Housing* and *Branch* is equally applicable here. First Hartford, as a shareholder in [the bank] has a property interest in any liquidation surplus. The interest in that liquidation surplus is created by the statutory direction that, if funds remain after all depositors, creditors, and other claimants have been paid, the receiver is to distribute such funds to the depository institution's shareholders. *See* 12 U.S.C. § 1821(d)(11) (1994). This contingent interest is not materially distinct from the property interest in *California Housing* and *Branch* because in those cases, like here, a judgment favorable to the plaintiff would increase the assets of the depository institution and thus potentially enlarge any liquidation surplus to be distributed among the shareholders.

*First Hartford,* 194 F.3d at 1288. Moreover, if the Shareholder Plaintiffs were permitted to recover Security's goodwill damages directly against the Government either through a direct claim or derivatively through a "bifurcated" procedure outside of the receivership, the possibility of double recovery could exist if in fact damages could ever be recovered. As articulated in *Statesman:*

> To accept private plaintiffs' allegations that their claim can be considered outside the rubric of receivership law would raise the possibility of double recovery. No question exists that the corporation, and therefore the receiver, is entitled to bring a claim for [the bank's] lost profits/lost equity value, but the court can award such damages only once. No authority authorizes the court to prorate the expectancy damages based on the degree of damage suffered by each party.

*Statesman,* 41 Fed. Cl. at 17. Denying the Shareholder Plaintiffs the ability to pursue the goodwill claims of Security outside the statutory priority scheme, whether "derivatively," directly, or through a "bifurcation" device, is not unjust. "Although private plaintiffs may once have been the sole owners of [the bank], they are no longer. Having been displaced, private plaintiffs have no choice but to operate within the confines of the receivership priority system." *Statesman,* 41 Fed. Cl. at 18.

However, even if the Shareholder Plaintiffs were able to use bifurcation to pursue the goodwill claims of Security *for the benefit of* the FDIC, there are still several insuperable barriers to their proposal. First, while it is true that, as stated in *Suess v. United States,* 33 Fed. Cl. 89, 93 (1995), "where the government has taken over and dissolved the corporation, this need for the derivative suit is particularly apparent and perhaps even poignant," the shareholders were permitted to sue derivatively in this case, as stated above, for the limited purpose of protecting *their own interest* in any surplus recoveries. *F.D.I.C.,* 47 Fed. Cl. at 6 ("Shareholder plaintiffs have never hidden the fact that they are suing derivatively on behalf of the shareholders, and maintain their claim is 'direct' in the manner Judge Turner termed it: 'a direct, vested interest in the surplus of potential recoveries.' "). In *First Hartford,* shareholders of a failed bank were permitted to sue derivatively because it possessed "a potential liquidation surplus" in any recovery by the FDIC. *First Hartford,* 194 F.3d at 1296. Although the Shareholder Plaintiffs insist that the holdings of *Branch* and *California Housing* permit them to pursue Security's goodwill claims, in fact nothing in *Branch* or *California Housing* suggests that the scope of the shareholders' derivative status in this case is

any greater than the shareholder plaintiffs in *First Hartford. Branch,* 69 F.3d at 1574-75 ("A judgment favorable to the plaintiff in this case would increase the assets of [the bank holding company] and could result in a surplus that would benefit [the bank holding company's] shareholders."); *California Housing,* 959 F.2d at 957 n.2 ("compensation to the corporation will result in a surplus in which the shareholder possesses a direct interest. . . ."). *See also First Hartford,* 194 F.3d at 1288 ("This contingent interest is not materially distinct from the property interest in *California Housing* and *Branch* because in those cases, like here, a judgment favorable to the plaintiff would increase the assets of the depository institution and thus potentially enlarge any liquidation surplus to be distributed among the shareholders.").

Because the Shareholder Plaintiffs have only a contingent interest in surplus recoveries, even if the Court were to permit them to sue the Government derivatively on behalf of the FDIC, in this instance bifurcation cannot solve the underlying standing issue that they seek to rectify. In the end, no matter whether the shareholders would be permitted to litigate the goodwill claims of Security on behalf of either Security or only for the shareholders' interest in the "surplus," the FDIC, as manager of the FRF, is still the legal owner of Security's claims and the FRF would still be able to pay itself with any judgment obtained in this case. In every instance the remaining surplus recovery for the Shareholder Plaintiffs would be zero because no viable theory of damages that exceeds the subrogated claim of the FRF-RTC exists. Thus, any attempt by the Shareholder Plaintiffs to proceed on the goodwill claims by bifurcating their claims from that of the FDIC would be an exercise in futility.

Finally, the Shareholder Plaintiffs cannot litigate the goodwill claims of Security derivatively and stay the FDIC's non-recoverable claims because the case or controversy issue is a component of subject matter jurisdiction and cannot be waived. *Sosna v. Iowa,* 419 U.S. 393, 398, 42 L. Ed. 2d 532, 95 S. Ct. 553 (1975); *Landmark,* 256 F.3d at 1380. Standing must exist at every stage of judicial proceedings. *Lewis v. Cont'l Bank Corp.,* 494 U.S. 472, 477-78, 110 S. Ct. 1249, 108 L. Ed. 2d 400 (1990). Because there is no case or controversy between the Government and the FDIC with respect to the goodwill claims, the Court lacks subject matter jurisdiction to entertain these claims under any guise or otherwise stay the FDIC's non-justiciable claims. *Desktop Direct, Inc. v. Digital Equip. Corp.,* 993 F.2d 755, 760 (10th Cir. 1993), *aff'd,* 511 U.S. 863, 128 L. Ed. 2d 842, 114 S. Ct. 1992 (1994).

Therefore, there is no basis for the Shareholder Plaintiffs in this case to sue derivatively for anything more than their share of surplus recoveries or to otherwise pursue a direct claim against the Government through "bifurcation," because there will be no surplus recoveries. Likewise, the FDIC's goodwill claims cannot be stayed because, if it lacks standing to pursue its claims, such claims must be dismissed. The Shareholder Plaintiffs' motion to bifurcate must, therefore, be denied.[10]

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[10] The Shareholder Plaintiffs also maintain that this Court must resolve certain vague "due process" issues before dismissal of the contract claims. It is unclear to the Court exactly what due process issues are at stake in this case, but, in any event, the shareholders cannot enforce any rights to a contract with the United States in which they were not a party to the agreements that gave rise to the present

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## VIII. Miscellaneous Arguments

The FDIC argues that a case or controversy can be established by means of a controversy between it and the Shareholder Plaintiffs over the means for distributing any recovery. However, this Court possesses jurisdiction only to entertain claims against the United States. 28 U.S.C. § 1491(a)(1) (1994). The claim before this Court is that the United States breached its contractual obligations to Security Savings. The shareholders have not brought an actual claim before this Court that the United States has somehow deprived them of proceeds that it was entitled to under a distribution scheme. *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 577, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992) ("but under Article III, Congress established courts to adjudicate cases and controversies as to claims. . . .") quoting *Stark v. Wickard,* 321 U.S. 288, 310, 88 L. Ed. 733, 64 S. Ct. 559 (1944). Nor can the FDIC remain in the case as a necessary party or as an intervener merely because the Shareholder Plaintiffs have a separate breach claim against the United States. As explained earlier, the Shareholders' goodwill claims are dependent on the resolution of the FDIC's claims, and because, in this case, there can be no surplus of recovery for the shareholders no matter whether the FDIC's claims are adjudicated or not, the FDIC cannot piggyback its non-justiciable claims onto the Shareholder Plaintiffs' non-viable claims. The FDIC's claims and

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action or are otherwise not in privity of contract with the United States. *Glass,* 258 F.3d at 1355.

the shareholders' claims, in this instance, must fall together.[11]

Finally, the FDIC argues that it must have standing to fulfill its statutory obligations to the receivership and claimants against it. *See e.g.* 12 U.S.C. § 1821(d)(2)(B) (duty to collect and administer assets), 12 U.S.C. § 1821(d)(11) (duty to distribute assets in accord with priority scheme), and 12 U.S.C. § 1819(a)(Fourth) (independent litigating authority). It cites *S.E.C. v. U.S. Realty,* 310 U.S. 434, 459-60, 60 S. Ct. 1044, 84 L. Ed. 1293 (1940) for the proposition that it must remain in the case to pursue its statutory duties. In *U.S. Realty,* the Security and Exchange Commission ("S.E.C.") sought to intervene in a bankruptcy proceeding to insure that the proceeding took place under Chapter 10 of the Bankruptcy Code (which afforded the S.E.C. supervisory rights) rather than under Chapter 11 as sought by the debtor. The Supreme Court held that the district court properly allowed the S.E.C to intervene in the case in order to maintain its statutory authority over certain kinds of bankruptcy proceedings, even though the S.E.C. had no direct personal or pecuniary interest in the litigation.

There are, however, two key differences between this case and *U.S. Realty.* First and foremost, *U.S. Realty* did not involve a situation where a non-justiciable intra-governmental controversy presented itself. Second, had it

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[11] The FDIC argues that it has ancillary standing in this case because the FDIC's expectancy damage theory may be greater than the amount of the subrogated claim of the FRF-RTC. However, that argument is moot because there is no viable theory of recovery which would be greater than the subrogated claim of the FRF-RTC.

not prevailed, the S.E.C. would have been prevented from fulfilling its statutory duties at the outset of the proceedings. However, the FDIC was in fact permitted to intervene in the Shareholder Plaintiffs' case *Bailey v. United States,* 47 Fed. Cl. 2 and was substituted as the Plaintiff and successor-in-interest to Security Savings in the present lead case. The FDIC has litigated this case pursuant to its statutory duties for some time. Therefore, *U.S. Realty* is inapposite.

Accordingly, all remaining goodwill claims of both the FDIC and the Shareholder Plaintiffs must be dismissed.

## IX. Takings

The Defendant argues that the FDIC's takings claims must likewise be dismissed. As of the date of this opinion, the FDIC has not provided the amount of damages suffered by a taking. If the FDIC cannot produce a plausible takings claim in excess of the FRF's subrogated claim, then the takings claim must likewise be dismissed. However, because the Court has already ordered briefings on the FDIC's and the Shareholder Plaintiffs' independent takings claims, the Court will not dismiss the FDIC's takings claim but will instead permit the FDIC to construct a takings theory that exceeds the subrogated claim of the FRF, if possible.

## X. Conclusion

The Defendant's motion for summary judgment is GRANTED in part. The Shareholder Plaintiffs' motion for bifurcation is DENIED. All goodwill claims that were not disposed of in the Defendant's motion for summary judgment

are dismissed due to the absence of a case or controversy between the Federal Deposit Insurance Corporation ("FDIC") and the United States. Consequently, the Shareholder Plaintiffs' contingent goodwill claims are extinguished.[12]

**IT IS SO ORDERED.**

EDWARD J. DAMICH

Judge

[12] Because all contract claims have been dismissed, the Defendant's motion for summary judgment based upon the FDIC's inconsistent statements and all motions in limine are denied as moot.

**FEDERAL DEPOSIT INSURANCE CORPORATION, as successor in Interest to SECURITY SAVINGS, BAILEY MORTGAGE COMPANY, SECURITY FEDERAL SAVINGS AND LOAN ASSOCIATION; and, H.C. BAILEY, JR., et al., Plaintiffs, v. THE UNITED STATES, Defendant.**

**Case Nos. 92-577C and 92-817C (consolidated under 92-577C)**

**UNITED STATES COURT OF FEDERAL CLAIMS**

**47 Fed. Cl. 2**

**May 8, 2000, Filed**

**COUNSEL**: Mary C. Gill, Alston & Bird LLP, Atlanta, Georgia, with whom was Alan W. Perry, Forman, Perry, Watkins, Krutz & Tardy, PLLC, Jackson, Mississippi, for H.C. Bailey, Jr., et al., plaintiffs.

Richard M. Schwartz, with whom was John M. Dorsey III, Federal Deposit Insurance Corporation, Washington, D.C., for plaintiff Federal Deposit Insurance Corporation, plaintiff.

Robert Steinbuch, with whom were James L. Anderson, Ming-Yuen Meyer-Fong, Thomas P. Reilly, William F. Ryan, Jeanne E. Davidson, Deputy Director, David M. Cohen, Director, and David W. Ogden, Acting Assistant Attorney General, United States Department of Justice, Washington, D.C., for defendant.

**JUDGES**: LOREN A. SMITH, CHIEF JUDGE.

**OPINION BY**: LOREN A. SMITH

**OPINION**:

**SMITH**, Chief Judge.

This extensively chronicled *Winstar*-related case is before the court on defendant's motions to dismiss and the parties' cross-motions for summary judgment on breach of contract.[1] Plaintiffs in these consolidated cases are the Federal Deposit Insurance Corporation (FDIC), successor in interest to the failed Security Savings and Loan Association (Security), and the shareholders of Security (Security shareholders).[2] The plaintiffs collectively contend that Security Savings had enforceable contracts with the government with respect to the accounting and capital treatment to be afforded goodwill, cash contributions, and income capital certificates (ICC's) arising out of two merger transactions in the 1980's, and that the passage of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), Pub.L. 101-73, 103 Stat. 183,

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[1] During the briefing on the motions, there was some confusion as to whether defendant had or had not filed cross-motions for summary judgment as to liability. In both its responsive briefs to the plaintiffs' two motions for summary judgment as to liability, defendant indicated only that it was filing responses to the motions of the plaintiffs and its own motions to dismiss. However, it appears quite clear from the arguments set forth in the government's briefs that, in fact, the government was moving for summary judgment as to the issue of contract liability. Regardless, thanks to sur-replies allowed by the court, the parties have had the opportunity to fully brief the motions to dismiss and cross-motions for summary judgment. The court's review is further buttressed by the additional briefing ordered by the court as part of the *California Federal* show cause process, *see California Federal Bank v. United States,* 39 Fed. Cl. 753, 779 (1997), and the additional Common Issue 11 briefing on the standing of investor and shareholder plaintiffs.

[2] The shareholders, who collectively own all the outstanding stock of Security, are H.C. Bailey, Jr., W.C. Bailey, Joan B. Bailey, Harperville Irrevocable Trust, Carol A. Bailey, Malco Irrevocable Trust, John T. Cossar, Glynn Hughes, Lewis S. Tilghman, Kenneth W. Warren and Madison Hills Farm, Inc.

and its implementing regulations breached those contracts. Defendant contends that neither the FDIC nor the Security shareholders can bring a cause of action in this court and that, regardless, the government never contracted with Security regarding the regulatory treatment accorded goodwill and the assistance involved in the transactions.

After a thorough review of the parties' briefs and the relevant law, with due consideration given to the prior *Winstar*-related opinions issued by this court, the court denies the government's motions to dismiss; denies defendant's motions for summary judgment as to liability; and grants the motions of the FDIC and the Security shareholders for summary judgment as to liability for breach of contract.[3]

## BACKGROUND

The saga of the Security Savings litigation is long. This case originally was initiated by Security Savings in the United States District Court for the Southern District of Mississippi, in an effort to stave off seizure by the government. After conducting an evidentiary hearing, the District Court concluded that the government "was contractually obligated to permit Security Savings to treat the ICC's and cash contribution as a capital asset," and that these obligations survived the passage of FIRREA. *See Security Sav. and Loan Ass'n v. Director, Office of Thrift*

[3] The court notes that this opinion does not address the constitutional Fifth Amendment taking claims of plaintiffs, which were not the subject of this phase of dispositive briefing.

*Supervision,* 761 F. Supp. 1277, 1283-85 (S.D. Miss. 1991). The District Court granted Security Savings' request for a permanent injunction against the government from enforcing the provisions of FIRREA in a manner inconsistent with the government's obligations under the agreements. *See Id.*

The United States Court of Appeals for the Fifth Circuit reversed the decision of the District Court, and held that the FIRREA intended to abrogate such agreements, and that as such a claim for compensation needed to be brought before the Court of Federal Claims. *Security Sav. and Loan Ass'n v. Director, Office of Thrift Supervision,* 960 F.2d 1318, 1323 (5th Cir. 1992).[4]

The case was subsequently transferred to the now Court of Federal Claims, and this court determined, upon motion of Security for a temporary restraining order or preliminary injunction to prevent the government from taking any action to interfere with the operations or control of Security, that it lacked the jurisdiction to grant the motion. *See Security Sav. and Loan Ass'n v. United States,* 26 Cl. Ct. 1000, 1003-04 (1992). That decision was upheld on appeal to the Court of Appeals for the Federal Circuit. *Security Sav. and Loan Ass'n v. United States,* 983 F.2d 1085 (Fed. Cir. 1992). Shortly thereafter, the Office of Thrift Supervision (OTS) seized Security Savings and appointed the Resolution Trust Corporation (RTC) as

[4] In the opinion, the Fifth Circuit referred only to a Fifth Amendment just compensation claim, but the same logic, of course, obtains for a suit founded upon breach of contract.

conservator.[5] The court then permitted the RTC to substitute as the real party in interest for Security Savings, and the shareholder plaintiffs filed *H.C. Bailey v. United States,* 47 Fed. Cl. 2, 2000 U.S. Claims LEXIS 109, and moved to intervene in *Security Savings.* By order dated February 25, 1998, the cases were consolidated for all purposes under Case No. 92-577C and have since proceeded in tandem in preparation for trial.

Two transactions are at the center of this case. The first is the 1984 assisted acquisition of New North Mississippi Federal Savings and Loan Association ("New North") by Security Savings and Loan Association. New North was a federally chartered savings and loan that had been formed to assume the assets and liabilities of a failing state chartered institution, North Mississippi Savings & Loan Association. The second transaction is the 1985 assisted acquisition of Security Trust Federal Savings and Loan Association of Oak Ridge Tennessee, by Bailey Mortgage Company, a wholly-owned subsidiary of Security Savings.

Plaintiffs contend that, in both transactions, the government contractually guaranteed that the cash

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[5] This case has proceeded under procedures developed after the Supreme Court's decision in *United States v. Winstar,* 518 U.S. 839, 116 S. Ct. 2432, 135 L. Ed. 2d 964 (1996). The court has discussed the procedures designed to resolve the fundamental issues of contract breach and standing in other opinions. *See, e.g., Bluebonnet Sav. Bank v. United States,* 43 Fed. Cl. 69, 71 (1999). For more discussion on the crisis in the thrift industry, and the response by regulators to this crisis, see generally the discussion in the Supreme Court's *Winstar* decision. *United States v. Winstar,* 518 U.S. 839, 116 S. Ct. 2432, 2440-47, 135 L. Ed. 2d 964 (1996).

contributions of the FSLIC and the income capital certificates purchased by the FSLIC could be used to meet regulatory net worth requirements, and that Security could continue to rely on the inclusion of the cash contributions in its net worth account indefinitely. Further, plaintiffs contend that the government guaranteed that Security could use the supervisory goodwill created from both transactions as an amortizing asset for regulatory purposes.

The government challenges several fundamental premises of the claims brought by plaintiffs as well as their right to bring these claims at all. Preliminarily, defendant argues that neither the Security shareholders nor the FDIC can bring suit on behalf of Security, and that hence their claims should be dismissed pursuant to RCFC 12(b)(4) for failure to state a claim upon which relief can be granted. Even were the FDIC and the Security shareholders somehow able to bring suit on behalf of Security, however, defendant contends the government did not contract with Security to guarantee the treatment of supervisory goodwill, and that, as far as the regulatory treatment of the cash contributions and ICC's, Security expressly agreed to language in the transactions shifting the risk of any regulatory change onto Security. The court will thus review the motions to dismiss, and then the parties' contentions about what Security and defendant contractually agreed to in the New North and Security Trust transactions.

## MOTIONS TO DISMISS

The government has filed motions to dismiss against both the FDIC and the Security shareholders. However, in

light of prior rulings of the court the motions must be denied. Briefly, defendant has filed two motions to dismiss against the Security shareholders: the first, filed in 1993 and subsequently renewed by the government after the stay was lifted in this case, contends that the Security shareholders cannot bring this action in a derivative capacity because, even if the court can entertain derivative suits, *see Suess v. United States,* 33 Fed. Cl. 89 (1995), it is axiomatic that shareholders cannot bring a derivative suit if the corporation – in this case, the FDIC as successor to Security – is bringing suit on behalf of the corporation. However, Issue Judge James T. Turner essentially disposed of that argument, citing *California Housing Sec., Inc. v. United States,* 959 F.2d 955 (Fed. Cir. 1992) and *Branch v. United States,* 69 F.3d 1571 (Fed. Cir. 1995), in permitting plaintiffs suing derivatively to file amended complaints alleging a cause of action to protect the shareholder interest in the surplus.

Sensing that this line of attack was forestalled by Judge Turner's ruling, defendant contends, in its second motion to dismiss directed against Security's shareholders, that the Security shareholders failed to file an amended complaint that complied with Judge Turner's guidelines for such amended complaints, and that the Security shareholders continue to assert a "direct" claim on behalf of the failed thrift, which they cannot do. Judge Turner's written opinion, which was issued after these motions were briefed, would seem to dispose of both of the motions to dismiss directed against Security's shareholders. Judge Turner, again relying on *California Housing* and *Branch,* concluded:

> Shareholder plaintiffs suing derivatively in the cases affected by FDIC's motion . . . have a direct,

> vested interest in the surplus of potential recoveries and, therefore, have standing to remain as plaintiffs in these actions notwithstanding FDIC's appearance on behalf of the failed thrifts.

*Plaintiffs in All Winstar-Related Cases at the Court v. United States,* 44 Fed. Cl. 3, 10 (1999). The government's motion to dismiss on the ground that plaintiff cannot bring a claim when the corporation has brought the claim is thus resolved against the government. The second motion, based on the government's contention that shareholder plaintiffs did not file a complaint that was premised on a "surplus" theory – that in effect shareholder plaintiffs are really trying to bring the claim of the thrift itself – is an unpersuasive semantic argument. Shareholder plaintiffs have never hidden the fact that they are suing derivatively on behalf of the shareholders, and maintain their claim is "direct" in the manner that Judge Turner termed it: "a direct, vested interest in the surplus of potential recoveries."[6]

Defendant's motion to dismiss the FDIC for failure to state a claim can be dealt with quickly. Briefly, defendant

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[6] The court does not address the important issue of whether shareholder plaintiffs can recover directly from the government or whether all damages must be channeled through the receivership estate. The court, in both this and Judge Turner's opinion, believes that this determination is appropriately an issue to be resolved during the damage phase of the proceedings, by the Trial Judge. As Judge Turner stated, during a hearing conducted on a Motion for Clarification brought by the Security shareholders regarding his May 20, 1999 opinion on standing issues, in reference to whether damages must flow through the receivership estate: "To the extent about how the money will flow, nothing in my opinion or order should be read as binding a trial judge on that." August 16, 1999 Tr. at 11.

contends that the FDIC cannot maintain the claim on behalf of the failed thrift because the FDIC sold the claim for, as defendant describes it, valuable consideration, to the RTC-Corporate, an agency of the federal government. Since that claim is now owned by the FDIC-Corporate, also an arm of the government, the FDIC is actually bringing a claim owned by the government against the government: what the government calls a classic nonjusticiable government dispute.

The court has addressed this issue before, in *Glass v. United States,* 44 Fed. Cl. 73, 80-81 (1999), and there is no need to elaborate, since the facts appear indistinguishable. For the same reasons articulated in that opinion, the government's position here is untenable. The FDIC, in several briefs in this case and in Common Issue 11 briefing, has demonstrated the chain of title to show that it is the only party that can bring the claim on behalf of the Security receivership, and that it is bringing the claim lawfully on behalf of the receivership estate.[7]

## MOTIONS FOR SUMMARY JUDGMENT

Defendant does not appear to contest that the agreements made with Security to effect the New North transaction and the Security Trust transaction were binding,

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[7] It does bear mentioning that defendant's position regarding who is the proper party in interest boils down to the proposition that there is no person or entity which, either on behalf of the receivership (which, of course, represents any unpaid private creditors and the shareholders) or the aggrieved shareholders, could bring a claim for breach of contract, *even if a contract existed, which the government breached, and which damaged the institution and its shareholders.*

dare we say even contracts. Defendant contends, however, that based on the clear contractual language the government never made an agreement as to the regulatory treatment of goodwill created in either transaction. As for the regulatory treatment of the FSLIC cash contribution and the ICC's, defendant contends that both agreements shift the risk of any regulatory change onto Security. The court will address each transaction in turn.

### *The New North Transaction*

In a series of resolutions dated August 2, 1984, the Federal Home Loan Bank Board (FHLBB) determined that an assisted merger of New North with Security Savings would be a less costly alternative to liquidation. FHLBB Resolutions 84-402, 84-403 and 84-404. These resolutions expressly authorized the FSLIC to enter into agreements with Security necessary to implement the merger. On August 3, 1984, the FSLIC and Security executed several agreements, including an Assistance Agreement. The Assistance Agreement contained an integration clause, which states:

> This Agreement ... constitutes the entire agreement between the parties and supersedes all prior agreements and understandings of the parties in connection with it, excepting only resolutions or letters issued contemporaneously with this Agreement by the Bank Board or the [FSLIC].

Assistance Agreement § 18. The Assistance Agreement thus expressly incorporated the Board Resolutions.

Among the relevant terms here, the FSLIC agreed to infuse New North with $39 million in cash to bring its

book value to zero. The FSLIC also agreed to contribute $3.5 million in cash to the resulting thrift, and to issue a $7 million note in exchange for an ICC to be issued by Security. Assistance Agreement § 3(a)(1)(B) and § 4. The FSLIC also agreed to permit Security to include the $3.5 million cash contribution and the $7 million ICC note in its net worth for purposes of complying with the regulatory capital requirements. Assistance Agreement § 3(a)(4).

Plaintiffs contend that the agreement specifically recognized that Security Savings would be entitled to use the purchase method of accounting in connection with the transaction. Plaintiffs point to FHLBB Resolution 84-402, which is incorporated into the agreement pursuant to § 18 of the Assistance Agreement. The Resolution states, in pertinent part, that the newly merged entity:

> shall furnish analyses, accompanied by a concurring opinion from such accountant, satisfactory to the Supervisory Agent, (a) specifically describe, as of the effective date of the merger, any intangible assets on Security's books as a result of the merger, and (b) substantiate the reasonableness of the amounts attributed to such assets, *including goodwill,* and the reasonableness of the related amortization periods and methods. (Emphasis added)

Plaintiffs thus contend that the resolution expressly contemplated the use of supervisory goodwill and its amortization.

Defendant argues that, because the Assistance Agreement is silent as to the issue of the treatment of goodwill, while it expressly addresses the treatment of the cash contribution and the ICC's to net worth, the agreement was designed expressly to exclude any

agreement as to the treatment of goodwill. The government thus concludes the following: "Clearly, Section 3(a)(4) was included to indicate that the cash contribution and ICC were to be included in regulatory capital and *a fortiori,* goodwill was not." Def.'s Resp. to FDIC at 10.

For several reasons, defendant's argument is unpersuasive. First, as the FDIC points out, the ICC and cash contributions were referenced in the Assistance Agreement, because, at least in part, they are a form of financial assistance from the FSLIC, while the use of supervisory goodwill is an accounting mechanism. It is not, as the FDIC points out, "assistance", in that it does not involve a payment to Security as with the cash contribution and ICC. Second, were everything else in the contract silent about the use of goodwill, defendant might have an argument, but Board Resolution 84-402, which is part of the contract, quite clearly anticipates that plaintiffs were planning to use and amortize goodwill created as a result of the merger. Lastly, were there any ambiguity about the treatment of goodwill, it is certainly clear, at least regarding the New North merger, that the new institution would have been insolvent, and eligible to be seized immediately by regulators, had the new institution not been able to count the supervisory goodwill to meet its capital requirements. Thus, the very nature of the New North transaction suggests that the supervisory goodwill was necessary to make the transaction viable.[8]

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[8] The court notes that, as defendant correctly points out, the decision of the District Court was reversed by the Fifth Circuit on this issue, for consideration by this court on a claim for compensation. *See Security Sav. and Loan Ass'n v. Director, Office of Thrift Supervision,*

(Continued on following page)

The court believes that the question of whether the regulatory treatment of goodwill is a contractual requirement of the New North contract can be resolved without resort to any extrinsic evidence. However, the evidence adduced by the District Court that shows the regulatory treatment of goodwill was an essential term of this contract is absolutely overwhelming. Everything, from the FHLBB supervisory memo explaining the transaction to the Board, to the testimony of Security officers, to the testimony of government regulators themselves, to the conduct of the regulators after the merger, indicates that the government agreed to the accounting treatment requested by Security. The facts were set forth, with great clarity, by the District Court in 1991. *See Security Savings and Loan v. Director, Office of Thrift Supervision,* 761 F. Supp. 1277, 1281-84 (S.D. Miss. 1991). In light of this record, the court is surprised that this issue has been challenged so vigorously by defendant.

Second, defendant argues that a review of the core documents in the New North transaction reveals that the parties "expressly" shifted the risk of a change of the laws regarding the regulatory treatment of the thrift. The government cites with favor *Guaranty Fin. Serv. v. Ryan,* 928 F.2d 994, 999-1000 (11th Cir. 1991), and its favorable footnote invocation in the Supreme Court's *Winstar* decision for the proposition that the risk of regulatory change

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960 F.2d 1318, 1323 (1992). Tellingly, however, the Fifth Circuit was agnostic as to these conclusions of the District Court regarding the contractual issues in the case. Although the court is not bound by the District Court's findings and conclusions, the court finds the argument and logic of the District Court compelling.

was shifted to the thrift. *See United States v. Winstar Corp.,* 518 U.S. 839, 116 S. Ct. 2432, 2452 n. 15, 135 L. Ed. 2d 964 (1996).

The court has discussed both *Guaranty,* and the Supreme Court reference, in a prior decision. *See Castle v. United States,* 42 Fed. Cl. 859, 862-64 (1999). The court has also noted, generally, its reluctance to grant defendant's successor regulation argument much credence. *See California Fed. Bank v. United States,* 39 Fed. Cl. 753, 777-79 (1997). There is no doubt, however, that what the Supreme Court found compelling about the language in the *Guaranty* case was its clarity, so, at a minimum, the court must look to see whether the language in this instance was unambiguously clear as to the issue of which party bore the risk of regulatory change. However, the language cited by defendant in the New North transaction, contained in § 3(a)(4) of the Assistance Agreement, which supposedly shifts the risk of all regulatory change onto Security, could hardly be more *unclear.* Given the court's reluctance to accept the government's position that Security would allow bank regulators, at their leisure, to alter critical terms regarding the accounting treatment of goodwill, which could affect the viability of the institution, the government's argument cannot be taken seriously when the language relied upon by defendant is so unclear.[9]

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[9] Indeed, it appears from the briefing that the government may not even take the successor regulation argument, at least as it applies to the New North transaction, very seriously. It only merits very brief attention in the government's initial responses to the motions of the shareholder plaintiffs and the FDIC for summary judgment, and is not addressed at all in the government's 90-day response to the FDIC's motion for summary judgment.

***The Security Trust Transaction***

On October 25 1985, Bailey Mortgage Company, a wholly-owned subsidiary of Security Savings acquired Security Trust in an assisted acquisition very similar to the New North transaction. The Security Trust transaction was implemented pursuant to an Assistance Agreement signed by Security Savings, Bailey Mortgage, Security Trust and FSLIC. The Assistance Agreement, as in the New North transaction, contained an integration clause that expressly incorporated the contemporaneous documents and FHLBB board resolutions. Briefly, the transaction involved a cash contribution of $1.442 million, and the purchase of a $2 million ICC, by the FSLIC. In addition, the transaction permitted Bailey to include the cash contribution and ICC in its regulatory net worth.

Defendant makes the identical argument regarding the treatment of goodwill created as a result of the transaction, and for the same reasons discussed above regarding the New North transaction, the government's argument is unavailing.

As with the New North transaction, defendant argues that "successor regulation" language contained in the Security Trust Assistance Agreement explicitly shifted the risk of regulatory change onto Bailey Mortgage. Although defendant's argument in this instance is a bit more viable than the successor regulation argument regarding the New North transaction, because in this instance there is actually language in the Assistance Agreement to which defendant can point, the argument is ultimately no more compelling.

Defendant does concede in its briefing that its argument here is similar to that addressed in Common Issue

12 as part of the *California Federal* common issue process, but defendant nonetheless believes that it merits a closer look because the language in the Security Trust agreement is substantially similar to that used in *Guaranty*. However, a quick review of the language cited in *Guaranty* and that used in the Security Trust transaction proves this is not the case. The relevant language in the *Guaranty* deal contains a sentence which reads:

> All reference to regulations of the Board or the FSLIC used in the Agreement shall include any successor regulation thereto, *it being expressly understood* that subsequent amendments to such regulations may be made and that *such amendments may increase or decrease the Acquiror's obligation under this Agreement* (emphasis added by the 11th Circuit).

*Guaranty* at 999. There is no equivalent language in the Security Trust Assistance Agreement or any other contract document. It appears, then, that there is no substantive difference between the generalized successor regulation language in the Security Trust Assistance Agreement and in the cases discussed in *California Federal*. *See California Fed.* at 777-79. As in that case, the government argument here is similarly flimsy.[10]

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[10] Two other points bear mentioning. First, as the FDIC points out in its briefing, defendant points to language in the assistance agreement which requires maintenance of the *amount* of regulatory net worth over time, but then attempts to argue that Security was also liable for any changes in what could be *included* in net worth. Defendant's own argument requires a jump in logic that suggests this successor regulation language is far from unambiguous as defendant suggests it is here.

(Continued on following page)

## CONCLUSION

The court concludes that Security Savings entered into a contract with the government to permit the thrifts to count supervisory goodwill and certain other items, including the FSLIC cash contributions and ICC's, in computing their regulatory capital requirements, and that the passage of FIRREA and its implementing regulations breached those contractual commitments. Although this issue was not the focus of the briefing on summary judgment, the court finds the analysis of the District Court persuasive regarding the applicability of the termination provisions of the New North and Security Trust Assistance Agreements and adopts the District Court's findings that the obligation as to the regulatory treatment of the cash contributions and ICC's was not terminated under the Termination provisions of the Assistance Agreements. *See Security Savings and Loan Association v. Director, Office of Thrift Supervision,* 761 F. Supp. 1277, 1279-81 (S.D. Miss. 1991). In addition, the court concludes that both the FDIC and the Security shareholders may pursue the claims on behalf of the failed thrift and its shareholders, although how damages will be distributed, should damages be found, is a question left for the Trial Judge.

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Second, the government's point once again raises the fundamental implausibility of this entire line of argument. The government would have this and other agreements read in such a way that one of the contracting parties – in this case, the government – could at any time and for any reason fundamentally alter the terms of the agreement in such a way that the very survival of the institution could be jeopardized at the government's option. It is difficult to fathom that a rational contracting party would agree to such terms.

Accordingly, the motions of the Security plaintiffs and the FDIC for summary judgment as to liability are granted, and the cross-motions of defendant, to the extent that cross-motions were filed, are denied. The motions of defendant to dismiss plaintiffs are also denied. It is further ordered that, pursuant to RCFC 77(f), the Omnibus Case Management Order (September 18, 1996), and the Priority Cases Pretrial Scheduling Order (April 2, 1997), this case is assigned to Judge Emily C. Hewitt for all further proceedings, except for motions for clarification of this opinion.

LOREN A. SMITH, CHIEF JUDGE

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**H.C. BAILEY, JR., BAILEY MORTGAGE COMPANY, CAROL A. BAILEY, GLYNN HUGHES, HARPERVILLE IRREVOCABLE TRUST, JOAN B. BAILEY, JOHN T. COSSAR, KENNETH W. WARREN, LEWIS S. TILGHMAN, MADISON HILLS FARMS, INC., MALCO IRREVOCABLE TRUST, and W.C. BAILEY, Plaintiffs-Appellants, v. UNITED STATES, Defendant-Appellee.**

**02-5170**

**UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT**

**2003 U.S. App. LEXIS 23816**

**October 28, 2003, Decided**
**October 28, 2003, Filed**

**NOTICE:** THIS DECISION WAS ISSUED AS UNPUBLISHED OR NONPRECEDENTIAL AND MAY NOT BE CITED AS PRECEDENT. PLEASE REFER TO THE RULES OF THE FEDERAL CIRCUIT COURT OF APPEALS FOR RULES GOVERNING CITATION TO UNPUBLISHED OR NONPRECEDENTIAL OPINIONS OR ORDERS.

**OPINION:**

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the APPELLANTS, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on November 4, 2003.

## CONSTITUTION OF THE UNITED STATES OF AMERICA

### U.S. CONST. art. III, § 2, cl. 1

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between a State and Citizens of another State; – between Citizens of different States; – between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

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### U.S. CONST. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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## 12 U.S.C. § 1821 (2003)

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**(d) Powers and duties of Corporation as conservator or receiver**

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**(11) Depositor preference**

**(A) In general**

Subject to section (e)(2)(C) [12 USCS § 1815(e)(2)(C)], amounts realized from the liquidation or other resolution of any insured depository institution by any receiver appointed for such institution shall be distributed to pay claims (other than secured claims to the extent of any such security) in the following order of priority:

**(i)** Administrative expenses of the receiver.

**(ii)** Any deposit liability of the institution.

**(iii)** Any other general or senior liability of the institution (which is not a liability described in clause (iv) or (v)).

**(iv)** Any obligation subordinated to depositors or general creditors (which is not an obligation described in clause (v)).

**(v)** Any obligation to shareholders or members arising as a result of their status as shareholders or members (including any depository institution holding company or any shareholder or creditor of such company).

* * *

**(g) Subrogation of Corporation**

**(1) In general**

Notwithstanding any other provision of Federal law, the law of any State, or the constitution of any State, the Corporation, upon the payment to any depositor as provided in subsection (f) of this section in connection with any insured depository institution or insured branch described in such subsection or the assumption of any deposit in such institution or branch by another insured depository institution pursuant to this section or section 13, shall be subrogated to all rights of the depositor against such institution or branch to the extent of such payment or assumption.

* * *